1 115-2

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. ~~1262.~~ 824

THE TEXAS AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES MURPHY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

FILED FEBRUARY 29, 1884.

If the law has actually no bearing on the case the fact that the court must examine it to ascertain whether or not the case depends upon its construction, has never been considered as making the case one arising under the law.

For a fuller discussion of the question involved, the court is referred to the briefs for the defendants in error in *Union Pacific R. R.* vs. *Myers* and *Texas and Pacific R. R.* vs. *McAllister*.

We submit that the judgment should be affirmed.

W. HALLETT PHILLIPS,
A. H. GARLAND,
for Deft. in Error.

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a THE TEXAS AND PACIFIC RAILROAD COMPANY, Appellant, *vs.* JAMES MURPHY, Appellee. } No. 1111.

From Harrison County, Texas.

At a term of the district court, begun and holden at the city of Marshall, within and for the county of Harrison, before the Hon. A. J. Booty, and ending this first day of January, A. D. 1881, the following case came on for trial, to wit:

JAMES MURPHY, Plaintiff,
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY, Defendant.

1 *Substituted Original Petition. Filed July 26th*, 1873.

THE STATE OF TEXAS, *Harrison County.*

In the District Court. June Term, 1877.

To the Hon. J. B. Williamson, judge of the 6th judicial district for the State of Texas:

Your petitioner, James Murphy, who resides in the State of Texas, and county of Harrison, respectfully complains to your honor of the Southern Pacific Railroad Company, a body corporate and politic, chartered and created by an act of the Legislature of the State of Texas, existing in the said State of Texas, and having its domicile and chief office in said county of Harrison. For that, heretofore, to wit, on or about the 26th day of May, 1871, petitioner was at the town of Jonesville, and one of the regular stations of the said railroad company upon its said road from the town of Hallville, in the said county, to the city of Shreveport, in the State of Louisiana, between which points the said company then had built, equipped, and in running order, using and running over the same regular trains of cars, for the purpose of carrying freight for the public, and passengers, and being desirous of traveling over the said road of the said company as a passenger of the regular trains
2 of said company, he, your petitioner, procured a ticket from the proper person or party at the said Jonesville station with the intent and for the purpose of traveling to the said town of Hallville on the said train, and upon the arrival of said train from the said city of Shreveport, bound to the said town of Hallville, petitioner was ready and waiting to get aboard of said train for the purpose aforesaid, and during the said stoppage of said train at said Jonesville station your petitioner was convenient to the entrance of the cars of said train awaiting the signal to be given by the manager or conductor of said train for all passengers traveling or wishing on said train to get into the cars of said train, and the said manager or conductor of said train, negligently and in utter disregard of the convenience and safety of the passengers traveling and wishing to travel on said train, gave the said signal of departure, and at the same instant of giving said signal caused said train to move, and

your petitioner immediately upon the giving of said signal proceeded to get aboard of said train by the means and at the usual entrance to the cars of said train, and your petitioner, in attempting
3 to get aboard of said train, as aforesaid, was thrown from said train by reason of the great rapidity with which the said train was then moving, and being thrown from said car, as aforesaid, and by means aforesaid, your petitioner fell upon the track of said rail road with his hand and arm across the iron rail of said railroad, and before he could recover and remove his hand and arm from off said rail the wheels of said cars passed and ran over his said arm, thereby crushing and almost totally severing his said hand from his body, and so bruised and mangled his said arm that the same was then and there amputated by good, skillful physicians, who were present for the purpose of saving the life of petitioner; and so petitioner avers that defendant, by the negligence and gross misconduct of its said agent and conductor of said train, crippled and maimed petitioner by the loss of his said hand and arm, as aforesaid, to his great damage in the sum of, to wit, of — thousand dollars. Whereupon petitioner prays for judgment against said railroad company for the said sum of — thousand dollars, the full amount of said dam-
4 ages, and for all costs in this behalf expended and for general relief.

W. R. POAG,
Att'y for Pl'ff.

Personally appeared before the undersigned G. B. Lipscomb, and upon oath says that the above and foregoing is a substantial copy, and contains all the material averments of the original petition in this cause filed on about the —— day of ——, 1871, and which original petition is lost and cannot be found, and the same is substituted for the said original petition by leave of the court.

G. B. LIPSCOMB,
Att'y for Pl'ff.

Sworn to and subscribed before me, this July 26th, 1873.
C. E. BOLLES, *Clerk.*
By D. S. HAWLY, *Dep.*

File: Substituted original petition. Filed July 26th, 1873. C. E. Bolles, cl'k. By D. S. Hawly, dep.

5 *Petition for Removal to the U. S. Court. Filed 1st Nov.*, 1878.

JAMES MURPHY
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY.

To the honorable the judge of the district court of Harrison county:

The petition of the Texas & Pacific Railway Company, defendant in the above-entitled suit, respectfully shows that that the above-

entitled action has been brought, and is pending in the district court of Harrison county, Texas, and is to recover of said defendant the sum of twenty thousand dollars, for damages, wrongs and injuries alleged to have been been committed by said defendant. That said action is a suit of criminal nature at law, and the matter in dispute, exclusive of costs, exceeds five hundred dollars, and arises under the laws of the United States.

That defendant is a corporation, created, existing, and organized under and by virtue of certain acts of the Congress of the United States, to wit: An act entitled an act to incorporate the Texas and Pacific Railroad Company, and to aid in the construction of its road, and for other purposes, approved March 3d, 1871, and an act supplementary thereto, approved May 2d, 1872.

6 That your petitioner has a defence to the said action arising under and by virtue of a law of the United States, to wit, said act of incorporation. That your petitioner is not a banking corporation, but is a railroad corporation, authorized to construct, own, and maintain a railroad to and from certain places designated in said acts of Congress above recited. That your petitioner hereby and herewith offers good and sufficient security for its entering in the circuit court of the United States for the western district of Texas, to be held at Tyler on the first day of its term, copies of the record of this suit—copies of all process, pleadings, depositions, testimony, and other proceedings in this cause. That it offers a bond with good and sufficient security, conditioned as required by the laws of the United States for doing such appropriate acts as are required to be done by the laws of the United States, made and provided for the removal of causes into the circuit courts of the United States for trial from the State courts. Your petitioner, therefore, prays that the said cause may be removed for trial to the circuit court of the United States for the western district of

7 Texas, at Tyler, and that this court accept the bond and surety offered and proceed no further in said cause.

F. B. SEXTON & WM. STEDMAN,
Att'ys for Defendant.

Affidavit for Removal.

THE STATE OF TEXAS, *County of Harrison:*

Personally appeared before the undersigned J. D. Davis, to me well known, who, being duly sworn, says that he is solicitor of the Texas and Pacific Railroad Company, duly authorized by it to appear, manage, conduct, and defend for it all suits to which it is a party in the State of Texas, and to present and file the above petition for the removal of said suit, and further says that the contents of the above and within petition and the facts therein stated are true.

J. D. DAVIS.

Sworn to and subscribed before me, this 22d day of October, A. D. 1878.

A. T. SMITH,
Notary Public, Harrrison Co., Texas.

File: Petition for removal to U. S. court. Filed 1st November, 1878. J. P. Lynch, clk. By J. L. Garrison, D. C.

Bond for Removal to the U. S. Court. Filed Nov. 1st, 1878.

JAMES MURPHY, plff. *vs.* TEXAS AND PACIFIC RAILWAY Co., Def't.

Know all men that we, the Texas and Pacific Railway Company, as principal, and ———, as sureties, acknowledge ourselves bound to pay unto James Murphy, the plaintiff in the above entitled suit, the sum of one thousand dollars, to be well and truly paid to him, his heirs, executors, administrators, or assigns, if default be made in the condition following:

Whereas the said James Murphy has commenced a suit as above entitled in the district court of Harrison county, Texas, and which is pending therein against the said The Texas and Pacific Railway Company, and the said defendant has filed its petition and made application for the removal of said suit into the circuit court of the United States for the western district of Texas, at Tyler.

Now, therefore, the condition of this obligation is such that if the Texas and Pacific Railway Company shall enter in the said circuit court of the United States for the western district of Texas, at Tyler, on the first day of its next session, copies of the record of said suit, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and then and there appear, and shall do such other appropriate acts as are or may be re-
9 quired in the premises by the acts of Congress for the removal of causes from the State courts, and shall pay all costs that may be awarded by the said circuit court of the United States if said court shall hold that such suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise of full force.

In witness whereof we have hereto set our hands, this 22d day of October, A. D. 1878.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
By J. D. DAVIS, *Solicitor and Agent.*
W. P. HUDJINS.
HERMAN KRETY.

Bond for removal to U. S. court. Filed Nov. 1st, 1878. J. P. Lynch, cl'k. By J. L. Garrison, D. C.

Order Overruling Motion to Removal.

JAMES MURPHY *vs.* THE TEXAS AND PACIFIC RAILWAY COMPANY.

On this the 9th day of November, A. D. 1878, come the defendant, The Texas and Pacific Railway Company, by its attorneys, and present its motion to remove this cause to the circuit court of the United States for the western district of Texas, and also pre-
10 sented its bond for said removal, and the plaintiff, James Murphy, also appeared by attorney, and both parties announced ready for trial on said motion, and the court, after hearing

the argument of counsel, and having duly considered the same, adjudges the bond tendered sufficient, and orders that the said motion to remove be overruled, to which ruling the defendants excepts.

Amended Original Petition. Filed 30 *Oct.*, 1878.

In District Court Harrison County. Fall Term, 1878.

JAMES MURPHY
vs.
TEXAS AND PACIFIC RAILWAY COMPANY. } 5606.

Now comes the plaintiff, and by leave of the court amends his petition herein filed July 26th, 1873, the one filed June 6th, 1873, the one filed May 22, 1875, the one filed May 21st, 1875, and the one filed May 25th, 1875, and says: That therefore, to wit, on or about the 26th day of May, A. D. 1871, petitioner was at the town of Jonesville, one of the regular stations of the Southern Pacific Railroad Company, a corporation created by an act of the legislature of the State of Texas, in Harrison county, Texas, about sixteen miles east of the city of Marshall,
for the purpose of going aboard of a train on said road as a pas-
11 senger from said town of Jonesville to the town of Hallville,
which is about fourteen miles west of the said city of Marshall, he, your petitioner, having a ticket received by him from a proper and authorized person, authorizing your petitioner to travel over said road from said Jonesville station to said Hallville station; that a regular passenger train came up and along said railroad track from the direction of Shreveport, in the State of Louisiana, and going in the direction of said town of Hallville.

That when said train arrived at Jonesville, as aforesaid, and stopped at said station, your petitioner was ready and waiting to go aboard thereof for the purpose aforesaid, and was standing convenient to the entrance of the said cars of said train, awaiting the signal to be given by the manager or conductor of said train for all passenners traveling, or wishing to travel on said train, to get into the cars thereof; that it was the custom of the said defendant to give a signal, either by ringing the bell on the engine or blowing the whistle, or in some other way, a sufficient time before starting to allow all persons desiring to
do so to get on board of the train. But petitioner
12 alleges that the manager or conductor of said train negligently, and in utter disregard of the convenience and safety of petititioner and other persons traveling and wishing to travel on said train, gave the said signal of departure, and at the same instant, or immediately before, caused said train to move; that your petitioner immediately upon the giving of said signal proceeded to get aboard of said train by the usual means, and at the usual entrance to the cars of said train, and you petitioner in attempting to get aboard of said train as aforesaid was thrown by said cars, by reason of the moving of the same, and fell upon the track of said railroad with his arm and hand across the iron rail of said road, and

before he could recover and remove his arm and hand from off said iron rail the wheels of the said cars passed and ran over his said arm, thereby crushing and almost severing his said hand from his body, causing petitioner great pain and suffering, and so bruised and mangled his said arm that the same was then and there
13 amputated by good and skillful physicians who were present for the purpose of saving the life of petitioner.

Petitioner further shows that the said train did not remain at the said station at Jonesville, although it was a regular station on said road, for the space of five minutes, as required by law, and as it was the duty of the manager or conductor of said train to have done; that had said train remained at said station the space of five minutes, as required by law as aforesaid, your petitioner would have had time sufficient to get aboard of said train, or if the usual signal for starting had been given sufficient time before starting to allow passengers desiring to do so to get on said train, petitioner would have got aboard at once, and thereby the injury received by him and the great bodily pain and suffering endured by petitioner, and the loss of his arm and hand, would have been avoided.

And so petitioner avers that defendant, by the great negligence and gross misconduct of its said agents and employees, the manager and conductor of said train, crippled and maimed pe-
14 titioner by the loss of his arm and hand as aforesaid, and caused him great bodily pain and suffering as aforesaid, to his great damage, the sum of twenty thousand dollars. Your petitioner further shows that heretofore, to wit, on or about the 21st day of March, A. D. 1872, the Southern Pacific Railroad Company consolidated with and became merged into the Texas and Pacific Railway Company under and by virtue of the authority of the legislature of the State of Texas by various acts, to wit: 1. "An act to encourage the speedy construction of a railroad through the State of Texas to the Pacific ocean, passed May 24, 1871." 2. "An act amendatory of and supplemental to an act entitled 'An act to encourage the speedy construction of a railway through the State of Texas to the Pacific ocean,' passed May 24th, 1871, passed Nov. 25th, 1871." 3d. "An act to adjust and define the rights of the Texas and Pacific Railway Company within the State of Texas, in order to encourage the speedy construction of a railroad through the State to the Pacific ocean, passed May 2d, 1873." Whereby the said
15 Texas and Pacific Railroad Company became liable to pay all the debts, obligations, and liabilities of the said Southern Pacific Railroad Company, and took possession of all the property, rights, and franchises of said company, and since that time has and now is operating the same road under and by virtue of the same charter granted to the said Southern Pacific Railroad Company. Wherefore petitioner prays that he have judgment for said sum of twenty thousand dollars, and for costs of suit.

G. B. LIPSCOMB AND
GEO. L. HILL,
Att'ys for Pl'ff.

File: Amended original petition. Filed 30th October, 1878. J. P. Lynch, cl'k. J. L. Garrison, D. C.

16 *Trial Amendment Filed Nov. 14th, 1879.*

In District Court of Harrison County. Fall Term, A. D. 1879.

JAMEL MURPHY
vs.
TEXAS AND PACIFIC RAILWAY CO. } 5606.

Now comes the plaintiff, and by leave of the court, files this his trial amendment and amends his amended original petition filed herein on the 30th day of October, 1878, and says that at the time the train reached Jonesville, he was there waiting to go aboard of said train and had a ticket issued to him by one Hill, whose given name is unknown to plaintiff, and who had authority to issue same from defendant and was recognized by defendant.

That plaintiff had procured said ticket to authorize him to travel upon said train, and intended so to do. But when said train reached Jonesville it stopped but a moment, and did not give plaintiff time to go aboard of same before starting. That when plaintiff, who went immediately to said train, being near thereto, to go abroad, the said train moved off without giving any signal, it being the custom of those in charge of trains of defendant to give signal before starting its train, either by ringing the bell, blowing
17 the whistle, or the conductor hallooing out, "All aboard," to notify persons desiring to get aboard to do so. That plaintiff being anxious to take said train immediately tried to get aboard, but the train, when the same was moving slowly, that when plaintiff caught hold of the railing and attempted to get aboard at the usual place of entrance, the said train was jerked suddenly and commenced to move rapidly, so that the plaintiff could not get aboard, and being afraid to let go he continued to hold on for a short distance, and by the motion of said train was thrown down, and he was injured as set out in said amended original petition. That said train did not stop at said station five minutes or long enough to allow plaintiff to get aboard of same. Plaintiff says that in attempting to get aboard of said train he did not act imprudently, as it was such an act a man of ordinary prudence and care would do under the same circumstances.

N. A. STEDMAN.
POPE & POPE & HILL *for Pl'ff.*

18 File: Trial amendment. Filed 14th Nov., 1879. J. L. Garrison, clerk.

Substituted Answer. Filed 4th Aug., 1874.

In District Court Harrison County. June Term, 1871.

JAMES MURPHY
vs.
SOUTHERN PACIFIC RAILROAD COMPANY. } 5606.

And now comes the defendant by attorney, and says that plaintiff's said petition is not sufficient in law.

And for plea and answer to said petition, the said defendant, by attorney, comes and denies all and singular the allegations therein made, and puts itself upon the country.

JAMES TURNER,
WILL. STEDMAN,
Def'ts Att'ys.

This day personally appeared before the undersigned authority, William Stedman, attorney of record for the Southern Pacific Railroad Company, who makes oath that the above and foregoing contains substantially the answer originally filed by the defendant in the above-entitled cause, which said answer has been lost.

WILLIAM STEDMAN.

Sworn to and subscribed before me, this 4th day of August, 1874.
W. C. PIERCE, *Cl'k.*

19 File: Substituted answer. Filed August 4th, 1874. W. C. Pierce, cl'k.

Amended Answer. Filed July 25, 1873.

JAMES MURPHY *vs.* S. P. R. R. Co.

And now comes the defendant, and amends the answer herein filed and says, that said plaintiff ought not to recover herein, because said defendant says that said plaintiff was not a passenger upon defendants cars, but had hired to a contractor to work upon defendant's road, and was waiting at Jonesville station to be transported to the point where he was hired to work, and while there indulged in liquor to such an extent that he was badly intoxicated, and after the train of defendant had come to the station and taken wood and water, and changed the mails, and had blown the whistle and started the engine, said plaintiff then attempted to get on the train while in motion, and by reason of his aforesaid drunkenness, and attempting to board the train while in motion was thrown down and had his arm crushed by a car wheel; that the injury to
20 plaintiff was not through the fault or negligence of defendant, or its agents, but owing entirely to the drunkenness of plaintiff, in attempting to board the train while in motion; and defendant further says that while the plaintiff was attempting to get on the train, one Shed, a mail agent, was also attempting to get on said train, and that said defendant and said Shed struggled together to get aboard of said train, and said defendant was thrown under the car and his arm crushed, and defendant says that it was — through any fault of the company or any of its agents or employees, nor was the mail agent either an agent employed or officer of said company, and the accident to said plaintiff was owing entirely to the attempt of said plaintiff, when the cars were in motion, and while another person was occupying the gangway, added to his intoxicated condition at the time. Defendant further says that the cars on their railroad stopped regularly at the Jonesville depot for a time sufficient to allow all persons to get on or off the cars; and

on the day that said plaintiff was injured, the train stopped at the station long enough to have allowed all passengers to get on
21 and off the cars, and the length of time required by the regulations of said company for said trains to remain at said station and other way stations on said road, and on the day in question, stopped long enough to take into the water tank 2,000 gallons of water, and transact the necessary business of the train at that station, and the defendant avers that the said plaintiff during all that time that the train stopped at the station, remained in a grocery store about fifty yards from the train, drinking, and laughing, and talking, and making no effert to get aboard the cars, and when the bell sounded, tried by running to get on, and in the attempt was hurt. And defendant says that said plaintiff had abundent time to get on the train while it was standing at the station, and was alone in fault for not doing so; and that after his attempt to get on the train it was not possible for the engineer or other persons in charge of the train to stop it, so as not to injure plaintiff. And defendant further says that said train did not leave said station until after the usual signal for leaving had been given, and that it was after said signal was given that plaintiff attempted to enter the
22 train, he having had abundant opportunity to enter said train before that time. Defendant further avers that said plaintiff was not a passenger traveling over their said road, and had not come on board of the cars as a passenger before the injury of which he complains, and that said plaintiff was not the holder of a passenger ticket over said road, and they show that he had not paid any money or other thing of value to said company for a ticket or for transportation over said road, and said company was in no manner bound to convey said plaintiff as a passenger over said road, nor was said plaintiff the holder of any obligation by which said defendant, for any valuable consideration, was obligated or bound to transport plaintiff over said road.

And this the said defendant is ready to verify.

STEDMAN & TURNER,
SEXTON & GREEN,
Atty's for Def't.

23 File: Amended answer. Filed July 25th, 1873. C. E. Bollos, clerk.

Defendant's First Supplemental Answer. Filed 10th Nov., 1879.

District Court, Harrison County, Tex. Fall Term, 1879.

JAMES MURPHY *vs.* T. & P. RAILWAY CO.

And now comes the defendant, and by leave of the court files this its supplemental answer, and says:

That the amended original petition of plaintiff, filed Oct. 30, 1878, is not sufficient in law, and no cause of the style of said petition is pending in this court; and they further except to said amended petition, because it seeks to amend several papers all named in the paper, which is not permissible under the rules, and because the

same is not endorsed as required by the rules, and because one of the papers amended is not named in said amended petition, to wit, a supplemental petition filed August, 1878.

And for special exceptions defendant says that the allegation therein that plaintiff had a ticket over defendant's road, received by him from an authorized person, is not sufficient, because—

24 1st. It does not appear who the person was, or how he was authorized to issue tickets.

2d. Because it does not appear whether the defendant ever issued the pretended ticket or that the defendant authorized the person from whom defendant received the ticket to issue it.

3d. Because the allegation concerning the pretended ticket, its issue, and what its effect was, is a legal conclusion, and no facts are alleged to the allegation that plaintiff was waiting for a signal, and that it was the purpose of defendant to give signals by ringing the bell or blowing the whistle, or in some other way. They say that the allegation is insufficient, because it does not state in what manner it was customary to give notice, and the term "or some other way," is too indefinite. The allegation to charge defendant with liability on account of a custom must state what the custom was; and because the aforesaid allegation renders the succeeding allegation likewise uncertain, because the succeeding allegation does not show what signal was given. And among the several allegations of the paper filed Oct. 30th, 1878, def't said defendant denies all the allegations and each separate allegation of said amended petition.

25 And defendant denies that plaintiff had a ticket issued by its authority that authorized him to travel as a passenger over its road, and denies that he had any ticket issued by authority of defendant, or by any one authorized by defendant or any agent of defendant, and that he had no ticket that would have authorized him to travel over defendant's road, and no ticket that authorized him to travel over the road of the Southern Pacific Railway Company, and he had no ticket issued by said Southern Pacific Railway Company, and had no ticket issued by any agent, officer, or any person authorized by either of said companies.

And defendant denies that the plaintiff was waiting at Jonesville station to take passage on said road. It denies that he was at the place where passengers get off or on the cars at any time before the train arrived at said station while it was there, or up to the time the train started from said station; but it says that the defendant was at a grocery store owned by one James Esles, entirely off of defendant's right of way sixty feet and more from its track, and after the train got to Jonesville, and while it re-

26 mained there, and up to the time and after the train moved away from Jonesville the plaintiff remained standing at said grocery; that after the train started, and while it was moving, the plaintiff run from said grocery and attempted to get on the train as it moved; that the plaintiff's conduct was the immediate and direct cause of his injury; he remained at the grocery talking for several minutes while the train was at

Jonesville, and not at, but away from, the place prepared for the reception of passengers, and off of and away from the right of way of defendant, and so continued to talk till the train moved away, and after it was moving and not did he attempt to get on the train, and while it was in motion and moving swiftly the plaintiff endeavored to climb up on the railings of a passenger car, and in so doing was thrown down and injured; that he had ample time to get on the train while it stood at Jonesville. At Jonesville is a water tank and the cars always stopped and took water there and no longer, which fact was well known to the plaintiff, and the train did stop there the usual time and did take water, and did afford plaintiff and all other persons ample time to get on the train
27 had he so desired, but his delay at the grocery till the train had started, and his attempt to board a moving train were acts of negligence on his part contributing directly to his injury. And defendant denies that Jonesville is a regular station on the railroad, but says that is what is called a flag station and water station, where the trains did always stop to obtain water, and to take on and put off such passengers as would make known their desire to get on or off the trains, but the defendant admits that passengers were in the habit of getting on and off trains at Jonesville during the time occupied in taking water; that the time so occupied was more than sufficient to enable all persons wishing to get on the trains. That plaintiff had ample time to get on the train had he not been negligent and away from the place provided by defendant for passengers to get off and on the train. That on the side of the road opposite where plaintiff was near the track defendant had constructed a platform for the convenience of passengers, and this platform was the usual place for passengers to get on and off the trains, that had plaintiff taken his
28 position on the platform, or near the road, he had ample time allowed him to get aboard, and even if he had not waited he had ample time to come to the train from where he stood and board the train. And defendant denies that it was usual or customary to give a signal at Jonesville, or elsewhere, to enable parties to get on and off the trains, that no such signal is usual or necessary, and neither the whistle or bell on the engines is ever used to give signals for any such purpose, and no such signal is usual either by bell, whistle, or otherwise, to enable parties to get on trains, but such signals are used for other and different purposes, and after all passengers are presumed to have boarded the train. And defendant denies that Jonesville was a regular station of the road, or that by law conductors were required to stop five minutes there; but defendant says that the train in this instance did stay and did remain at the said station exceeding five minutes, and did remain long enough to enable plaintiff to get aboard had he desired to do so; that plaintiff did not come to or near the platform or cars, and gave no notice, either by word or act, from which the conductor could con-
29 clude that he desired to take passage on the cars, but negligently remained at a store room sixty feet away until the train started; and defendant denies that the person in charge of said

train acted negligently or in utter disregard of the convenience or the safety of plaintiff, and denies that the said agent gave a signal of departure at the same instant or immediately before the train moved. Now defendant says that the trains usually ring the engine bell and blow the whistle about the time of starting, but such whistle and bell are not so sounded or blown as a signal for passengers to get on the train, but as a precaution to prevent persons under or near or before the cars to get out of the way of the moving trains, and not as a signal to passengers to get on board. And defendant denies that it ever did at any time consolidate with the Southern Pacific Railroad Company or any other company, but affirms the fact to be that for a consideration of over three millions of dollars it purchased and paid for all the road and rolling-stock and franchises of the Southern Pacific Railroad Company, that said latter company was never dissolved, was amply solvent, and never did, as far as defendant knows, cease to exist as a corporation.

TURNER, CAMPBELL & STUART,
Att'ys for T. & P. R. R. Co.

File: 1st supplemental answer. Filed Nov. 10th, 1879. J. L. Garrison, cl'k.

30 *Exceptions to Defendant's 1st Supplemental Answer. Filed 10th Nov.*, 1879.

District Court Harrison County. Fall Term, 1879.

JAMES MURPHY *vs.* T. & P. R. R. Co.

Plaintiff excepts to the supplemental answer of defendant filed herein, on the — day of Nov., 1879, because the same is no defence to this suit, and especially to that part of said answer which states that plaintiff had no ticket to authorize him to travel on defendant's train; becuase the same attempts to set up an immaterial issue, and one that constitutes no defence to plaintiff's cause of action

LIPSCOMB HILL,
N. A. STEDMAN,
A. POPE, *for Pl'ff.*

File: Exceptions to def't 1st sup. answer. Filed 10th Nov., 1879. J. L. Garrison, cl'k.

Statement of Facts. Filed 10th Jan., 1881.

STATE OF TEXAS, *County of Harrison*:

District Court. Fall Term, 1880.

JAMES MURPHY
vs.
SOUTHERN PACIFIC R. R. CO. AND TEXAS PACIFIC R. R. CO.

Be it remembered that at the present term of the court, the

above-entitled cause came on for trial, and the following facts appeared in evidence:

The plaintiff called Dr. C. Knox, who, after being sworn, testified as follows:

31 I know the plaintiff in this case; I have known him since May, 1871, and knew him at that time at Jonesville, which was then and now is in Harrison county, Texas, 16 miles east of Marshall. The Southern Pacific Railroad then run between Shreveport, La., and Hallville, Texas. The Texas Pacific Railroad now uses the same track; a train ran between these two points at the time mentioned, and stopped at Jonesville for mail purposes and to put off and take on passengers. On the day Murphy was injured he and I were standing and talking in front of Estes' store on the north side of the railway, about 25 y'ds from the track; within three or five minutes after Murphy and I commenced talking the train came up, and it was a mixed train. Murphy quit talking somewhat abruptly, and immediately started towards the train, and when I looked the train was moving slowly and Murphy was running towards it; when Murphy reached the train it was moving slowly, but increasing its speed rapidly. He caught hold of the front end of the rear car, and attempted to get aboard, but his foot slipped, and he failed; he held on and ran along some distance with the train, when his legs struck the opposite side of a ditch and he was thrown down

32 and his arm run over by the train. I think that the train had moved about a car length when Murphy first caught hold of the train. The custom of those charged with operating of the company at that time was to give a signal of departure, such as ringing bell, blowing whistle, and sometimes conductor calling out, "All aboard." I heard no signal that day. If any had been given I was near enough to have heard it. I am a practicing physician, and have been for twenty years. Murphy's arm was crushed, and it was amputated by Dr. Vaugn and myself. I considered amputation necessary. It was amputated about three inches above the wrist. He, Murphy, was in bed four weeks, and required treatment for four months. He had something on his person when he was hurt. I gave it to a little negro standing by, and have not seen it since. It seemed to be a railroad ticket of some kind. No other railroad was running by Jonesville at that time. The train barely stopped; it did not stop at Jonesville that day exceeding two minutes. I saw James Estes get off the train by which Murphy was hurt and walked

33 to his store, where I was talking. A man by the name of Shed got on the train that day right ahead of Murphy. He was mail agent, and ran on train daily. I have been about railroad stations a good deal during the arrival and departure of trains. It was frequently the case that persons got on the train on the side where Murphy did; train stopped at the usual place. There was no platform on the side where Murphy tried to get on, and don't think there was one on the other side at that time.

Upon cross-examination Dr. KNOX said:

The reason I noticed so particularly how long the train stopped that day was because of the accident, &c.; I have noticed bells ringing and whistles blowing on the leaving of a train. I call ringinging a bell or blowing a whistle a signal; sometimes conductor cries out, "All aboard." I don't know what signal was used at that time as a general thing. Think first one was used and then the other. Trains frequently passed Jonesville without taking water or oiling up engine. I don't know whether or not Murphy notified R. R. employees whether he intended or desired to get aboard the train.
34 There was a R. R. ticket agent at Jonesville at that time. The paper I took from Murphy's pocket had on it the words, "Admit the bearer to report to Major Hiatt." The paper spoken of was printed in large letters on paste board. The paper was not signed by any person whatever. There was a curve on the north side of the track where Murphy attempted to get on, and the track was more elevated on that side than on the other. The trains did not then stop there a uniform length of time; sometime stopped short while, and other times long enough to have a chicken fight.

JAMES MURPHY, next witness, was called, and testified as follows, after being duly sworn:

I was in Jonesville on 26th May, 1871, waiting for the train on which I intended to go to Hallville to work for Major Hiatt. When the train reached Jonesville I was talking to Dr. Knox. As soon as train stopped I started towards it, running as fast as I could, and when I reached it it was running slowly. I took hold of the railing at the usual place for passengers to get on, and
35 she gave a jerk, and my foot slipped from a jolt. One of the train men got on just ahead of me. He was mail express agent. Hiatt was a contractor who was building the road from Hallville to Longview. I had a ticket in my pocket upon which was written, "Pass bearer to Hallville to Maj. Hiatt." Signed, "Maj. Hiatt." It was customary to give signals by ringing or blowing whistle at that time on the departure of trains. None was given the day I was hurt. After I was hurt I was insensible for some hours, and was in bed some three or four weeks. I suffered much pain. I suffered for about a year. When I attempted to get aboard the train the first time my foot slipped, and I ran along with the train until my feet struck against the opposite side of a ditch, by the track, when I was thrown down upon my back and my arm cut off by the train. The train stopped at Jonesville that day about one minute. Plaintiff exhibited his arm to the jury, which shows it to have been cut off a short distance above the wrist.

Upon cross-examination, MURPHY said:

36 The cars were standing still when I started to them, but before I reached them they moved. I started in a run; I heard no signal and saw nothing to indicate to me that the train was about to start. I know no other reason why I started in a run

to the train while it was standing still than that I was afraid I would get left. When I started to the train it had been at Jonesville about half a minute. It generally stopped there five minutes. I was talking to Dr. Knok about some ditching I had been doing for him. It was (15) or (18) steps from the place where I was standing talking to Knox to the place where I tried to get on the train. I had no reason to believe that the train would stop at Jonesville a shorter time that day than on any other, but I ran to the train because I was afraid I would get left and lose my job. I had no other reason for running, for I heard no signal of any kind.

W. R. JENNINGS, next witness for the plaintiff, was called, and after being sworn, testified as follows:

I knew Hiatt was called Maj. Hiatt. He had contract for
37 building road from Hallville to Longview. I worked for him in June and July of 1871, and passed hands up and down the road as agent for Hiatt. His passes were recognized as valid by the railroad company.

A. M. VANNESS, next witness for plaintiff, after being sworn, testified as follows:

I am a carpenter, and have worked on railroads off and on for ten years. Worked on railroad from Hallville to Shreveport in 1870. It is customary and usual for passengers to board moving trains. Hardly ever saw train start without some person getting on it after starting; never saw any one hurt. Have seen ladies get on moving trains, also boys.

On cross-examination VANNESS said:

It is highly imprudent for a person to attempt to board a moving train. Persons not connected with railroads are more liable to be injured by such conduct than those connected therewith and daily accustomed to it.

JAMES ESTES, first witness for the defence, was called, and being sworn, testified as follows:

38 In May, 1871, I resided in Jonesville, where I was engaged in the grocery business. My house of business was about twenty yards from the track. I remember the day Murphy was hurt. I had been to Shreveport that day. Murphy was hurt by the train I came on from Shreveport. Maj. Turner, Maj. Burnham and others were on the train. I got off the train when it stopped, and walked to my store with some bundles in my arms. I passed Murphy and Knox, who were talking in front of my store, and walked in to the counter and laid my bundles down, and walked back to the front door; as I got to the door I saw Murphy running to the train; the train was then moving slowly, but when Murphy reached it and caught hold of it, it was going much faster. It was running as rapidly as any train could have run for the distance it had gone. Murphy caught hold of the front end of the rear car, and the distance from the place where I got off to where Murphy first caught

the train was thirty or thirty-five yards. I have measured the distance since the last trial of this case, in company with Mr. Stuart. The distance walked by me from the train to my store was about thirty or thirty-five yards; the distance from where Murphy
39 was to the place where he caught the train was eighteen or twenty yards. A person could easily have walked from my store, and got aboard of the train, if he had started as soon as the train stopped.

Cross-examination:

Persons got on the train on both sides of the track. I usually got on at the north side. I don't know that there was a platform on the south side of the track at that time. The track at Jonesville curved toward the north, and was higher on the north side than south side. I usually wait for signals to get aboard. I frequently hear bells, whistles, and "All aboard." These things I call signals. Don't know how soon train started after I got off. It would take a mixed train, like the one in question, longer to get under way than a short passenger train. When Murphy first caught the train he failed to get up, and he ran along with the train until he reached a ditch, when he struck the other side, was thrown down, and had his hand mashed off. The passenger coach that I came on and got off did not stop that day where platform then was, if there was any, nor was there any platform where I
40 got off. The train usually stopped with the engine at the water tank, and the place where the passenger car stopped depended on the length of the train. I am a tall man and usually walk fast.

The plaintiff introduced the following private laws of the State of Texas, to wit:

"An act to encourage the speedy construction of a railway through the State of Texas to the Pacific Ocean, passed May 24th, 1871. 2nd, an act to adjust and define the rights of the Texas and Pacific Railway Company with the State of Texas, in order to encourage the speedy construction of a railway through the State to the Pacific Ocean, passed May 2d, 1873." And plaintiff agrees that said acts may be read in the Supreme Court as part of the statement of facts without copying said acts here in full.

The plaintiff called Maj. Wm. Stedman, who swore the Texas and Pacific Railroad Company and the Southern Pacific Railroad Company were consolidated on or about the 2d of March, 1872.

JOHN JONES, next witness for defendant, after being sworn, testified:

41 I was fireman on the train that ran between Shreveport and Hallville in May, 1871, on the S. P. Railway. Harry Slater was the engineer on the train. I remember the circumstance of Murphy's getting hurt on the 26th of May, 1871; heard of it next day when we went back to Shreveport. The day the accident occurred to Murphy we took on water and oiled engine. We usually took on water at Jonesville. It was a slow process on account

of the construction of the tank; after engine took water we oiled the trucks and engine, and it must have taken us at least fifteen or twenty minutes.

Cross-examination Jones said:

I am in the employ of the Texas and Pacific Railway Company, and have been continuously since 1875; never was a witness in this case before. We never stopped at Jonesville at that time without taking on water, because Jonesville was our principal water station at that time, there being no water tank at all between Jonesville and Hallville. There was a platform on the south side of the track at Jonesville. We never were in the habit of giving any
42 signals on the departure of trains for passengers to get aboard. At that time the bell cord run from the engine over the tops of the cars back to the passenger car; the train a mixed one of twelve or sixteen cars and one passenger car. There was then a platform on the south side five to ten car lengths from the tank. We usually pulled up to the platform to take on ladies, but not men.

JAMES TURNER, next witness for the defence, after being duly sworn, testified:

Defendant called James Turner, who swore that he was on the train on the day Murphy was hurt, but did not know of his hurt until the next day. Saw a crowd of persons assembled at a point on the railway track between Estes' store and the tank, but did not then know what had occurred. Witness was returning from Shreveport. The train stopped at Jonesville; could not say how long; could tell what witness done and saw while it stopped; was in the second car from the rear. This car stopped opposite Estes' store; witness could, from where he sat, see persons in the store sitting on the counter; could not remember in what part of the
43 car (front or rear) he was sitting. Saw J. M. Estes on the train; he was in rear car. Estes got off somewhere in rear of where witness was sitting, and walked to the store; saw Estes go into the store with some bundles in his arms, and saw him afterwards come out of store in his shirt sleeves. Witness was talking with A. M. Burnham when the train got to Jonesville, and talked with him after it got there. Awhile after the train got to Jonesville Burnham got off, and witness was talking to him from the window when the train started; was in full view of Estes' store. Saw several persons on the portico in front of the store; don't remember any of them; did not at that time know Murphy; could not say whether he was on the porch; could have seen a person running from Estes' store to the train, and saw no one run from there to the train while it was stopped at Jonesville. Estes' store is on the north side of the track, about sixty feet away. McAllister's store was on the south side, about 50 yards from the track. There was no platform on the north side. The track was higher on the north side than the south side in front of Estes' store, but further east is about level. There was a platform on the south

side for passengers about on a line between McAllister's
44 store and Estes' store. Witness while a director of the road caused a platform to be put there to enable passengers to get on and off the train. While the train stopped at Jonesville witnesss saw two or three women come from the storehouse of A. F. McAllister, and get on board the train. Mr. Snell was the conductor, but don't remember seeing him while the train was at Jonesville.

Cross-examination:

The train started with a hard jerk that threw witness over against the forward seat. Witness remarked that they would kill somebody starting trains in that way if not more careful, or something to that effect. Witness had seen persons get on and off trains at Jonesville on the side next to Estes' store, but cannot say whether it was customary or with the knowledge of the conductor; could not say how fast the train was moving—at considerable speed—when Murphy tried to get on, if he made the attempt at the time stated, but it could not have been fast, nothing like full speed; have seen persons get on and off moving trains, but can't say as to its being customary, except, perhaps, in the case of train men; don't
45 think a prudent man would have tried to get on that train; have seen persons get off the train at Jonesville, on eastbound trains, west of the tank; don't know whether the train took water at Jonesville that day; it was customary for them to do so; don't know whether the bell was rung or whistle was blown before starting that day; don't recollect hearing bell before starting; did hear it, though, after starting. There was a platform on the south side of track, constructed for use of passengers, opposite Estes' store; did not know at the time what caused the heavy jerk of which witness spoke; thought it was fault of engineer in charge of locomotive; have learned since and do now know what caused the jerk; it was caused by some of the cars being close up together and others apart to the full extent of the coupling; when the train starts those cars close together are liable to jerk; have noticed same thing frequently since, especially in mixed trains; the train that day had five or six cars, two for passengers, the others freight; don't mean to say the bell was not rung, only that witness did not hear it; have never known of any custom for passengers to get on moving
46 trains, but have known them to do so; at the time spoken of the road had been extended to Hallville, and trains were running from there to Shreveport; there were three water tanks on the road at Hallville, Jonesville, and at seven miles from Shreveport; the tank at Marshall had been discontinued at that time; there was a bell rope on mixed trains on the Southern Pacific Railroad at that time, but have no recollection about this train; it is not usual or customary for passengers to get on moving trains, and not usual for them to get on trains moving like this one was.

Cross*ed*-exam.:

Did not see Murphy try to get on train, and can't say how fast it was moving. It started with a pretty severe jerk. I did not know

the cause of the jerk, but know it now. The track is higher next to Estes' store than east, and higher on the north than south side. I had the platform put there in consequence of seeing a lady fall from a chair in trying to get on and off the train at that place.

JOHN F. DIXON, next witness for defence, was sworn, and testified as follows:

47 I was gen'l superintendent of the Southern Pacific Railway Company in May, 1871, between Shreveport and Hallville. There was a platform at Jonesville, on the south side of track; no facilities for getting on or off cars prepared on the north side. Passengers were invited and expected by the company to get on and off on the south side. I was familiar at that time with the running of the trains. The conductor's place is on the platform side of the cars, and he being there, is not expected to see and receive passengers on the opposite side. There is no signal given, and was not at the time, for passengers to get aboard, but the bell is rung by the engineer to notify persons standing around to clear the way and be careful.

Cross-examination:

The conductor usually cried "All aboard," and waited a moment, and when he sees all ready, then gave signal to engineer, who rang the bell just as the train would start. If the train was accustomed to stop at a particular place at Jonesville, I suppose conductors took on passengers at that place. Jonesville was the principal watering place between Hallville and Shreveport. Don't know whether trains always stopped there to take water or
48 not—no water tank at Marshall at that time. If trains was accustomed to stop at other places than platform, then the signal "All aboard" would be an invitation to get on at that place.

J. and C. SLATER, next witness for defendant, sworn and testified:

I was a locomotive engineer in 1871, in May ran between Shreveport and Hallville, on the S. P. R. R. I was engineer on the train that hurt Murphy. I took water at Jonesville that day; I *always* took water there, because it was the principal watering place between Shreveport and Hallville, and I could not possibly run my train through without watering at Jonesville. There was no water tank at that time at Marshall. The day Murphy was hurt we took on water and oiled trucks and engine. It must have taken ten minutes or more to take on water. I gave signal that day on departing. I looked on the south side where — platform was and signaled conductor as I always did.

On cross-examination SLATER said:

I don't remember when we got to Jonesville or Greenwood, nor exactly when we left Shreveport; I am positive that I took water at Jonesville that day. My recollection of the fact is based
49 on the fact that I never did pass Jonesville without taking water than upon any particular recollection of that particular

day. Never was here before as a witness. Jim Daly was not there until the road commenced to be built between Hallville and Longview. I did not know until next day that my train had hurt Murphy; when on my way back to Shreveport next day I was told of the accident. I know it was my train, because no other train had passed west the day before. Don't know whether my train hurt Murphy or not; on my way back next day heard of accident. It may have been several days.

VANNESS recalled by plaintiff, testified that he was on the side track at Jonesville sitting on a hand-car; was working on bridge. I was on the side track the day Murphy was hurt, and Jim Daly was the engineer on the train, and August, the conductor. I waived my hand to him that day. There was a tank in Marshall in use at that time. Daly came here, I think, in 1870. I do say there was a side track at Jonesville. There were two trains then running between Hallville and Shreveport.

50 McALLISTER called by defence, testified that there never was at that time a side track at Jonesville, and that he had been, and was, doing business in Jonesville at the time Murphy was hurt; there was a span of old track north of the track.

JAMES TURNER, recalled by defendant, said:

There was no side track at Jonesville at the time, Murphy was hurt, and there never had been one there. I am positive that there never was a side track there on the north side or south side; there was a few rails of the old Swanson landing track that was sometimes used as a side; it was about a hundred and fifty yards northwest of Jonesville station, but there was no side track at Jonesville, nor near it on the south side where Vanness said he was sitting.

In this case the parties failed to agree to a statement of facts, and the counsel for each party presented me a statement of facts, and from those statements and from my own knowledge of the facts of the case. I have prepared the foregoing statement and approve the same as a correct statement of facts given in evidence on the trial of this cause. This January 8th, 1881.

A. J. BROTY,
Judge 2nd Judicial District.

File: Statement of facts. Filed Jan. 10th, 1881. Alex. S. Fields, clk.

51 *Charge of the Court. Filed Nov. 20th, 1880.*

JAMES MURPHY
vs.
T. & P. RAILWAY CO. } No. 5606.

GENTLEMEN OF THE JURY: This is a suit instituted by James Murphy originally against the Southern Pacific Railroad Company, the complaint of the said Murphy is in substance that about the 26th day of May, 1871, he was at Jonesville, in Harrison county, Texas, a station on the line of said railroad, for the purpose of trav-

elling as passengers on said railroad from Jonesville to Hallville, and that the agents and employees of the train of said railroad company, which passed Jonesville going west on said day, and on which plaintiff intended to travel as a passenger, did not stop the said train at said station for the length of time required by law, and started said train without and before giving any signal of their intention to start said train, and that plaintiff, in attempting to get aboard of said train, was, without imprudence or negligence on his part, by the negligence and gross misconduct of the agents of said railroad company, violently thrown down with his arm
52 across the iron track of said railroad, and that the car wheels passed over and broke and crushed his arm, so as to render its amputation necessary, and for said injuries so declared by the plaintiff to have been inflicted on him by said railroad company, he brought this suit alleging the damages sustained by him to be twenty thousand dollars.

The plaintiff further alleges that since he suffered said injury, and about the 21st of March, 1872, the said S. P. Railroad Company was merged in and consolidated with the Texas and Pacific Railroad Company, whereby the Texas and Pacific Railroad Company took possession of all the property, rights, and franchises of said Southern Pacific Railroad Company, and that since said consolidation the said Texas and Pacific Railroad Company has used and operated, and still uses and operates the said property, rights, and franchises, and the plaintiff prays for a judgment for twenty thousand dollars against said Texas and Pacific Railway Company, for the said injury so alleged by him to have been inflicted on him by the Southern Pacific Railroad Company.

53 The defendant denies the truth of all the allegations of the plaintiff, and alleges that the injury of which he complains was the direct result of his own negligence and want of care.

I give you the following instructions as the law by which you are to be governed in making your verdict in this cause:

It is the duty of a railroad company to stop its passenger trains at each station not less than five minutes, and longer, if necessary, to enable passengers with safety to get on or off, the passengers using reasonable diligence to do so in accordance with their condition and circumstances.

If the plaintiff in this case had a ticket which authorized him to travel on the train of the Southern Pacific Railroad, and if in attempting to get on its train he was thrown down and injured, and if this injury was caused by the negligence or failure of duty upon the part of the said railroad, its agents, or servants, he is then entitled to recover; if, under the instructions hereinafter given, you should find that the present defendant, the Texas and Pacific Railway Company, is liable for the debts and liabilities of the
54 Southern Pacific Railroad Company, unless the said plaintiff by his own negligence or want of care, so far contributed to the bringing about of his own injury as to deprive him of any remedy.

The fault or negligence on the part of plaintiff, which will pre-

clude him from a recovery, if there was negligence both upon his part and upon the part of the railroad, its agents or servants, is not the least degree of fault or negligence; but it must be of such a degree as to amount to the want of ordinary or reasonable care on his part under the circumstances at the time of the injury.

By ordinary care is meant that degree of care which may be reasonably expected of a person in the situation of the plaintiff at the time the injury was received.

A railroad company, in the conduct and management of its trains, is required to employ skillful and competent agents, and to use such means and foresight in providing for the safety of passengers as persons of the greatest care and prudence usually exercise
55 in similar cases; and should an injury result to a passenger from the failure to use such a degree of care and prudence, the company will be responsible for such injury, unless it appears that the passenger is injured by the use of ordinary care and prudence—that is, such a degree of care and prudence as might be reasonably expected of a person in the situation of the party injured in his condition and circumstances—could have avoided the injury. But a railroad company is not responsible for an injury to a passenger which is the result of a mere accident or casualty—where there is no want of care or skill on the part of the company or its agents.

The defendant in this case if liable at all for the debts and liabilities of the Southern Pacific Railroad Company, under the instructions hereinafter given, is responsible to the plaintiff for any injury he may have received, if the negligence of the Southern Pacific Railroad Co., or the negligence of its agents or servants, was the primary and proximate cause of the injury complained of, although there may have been negligence also on the part of the plaintiff, Murphy, unless it appears that under the circumstances he could, by
56 the exercise of ordinary care, have avoided the consequences of the negligences of the Southern Pacific Railroad or its agents.

But the plaintiff cannot recover, notwithstanding there may have been negligence on the part of the railroad or its agents which contributed to the bringing about of the injury of the defendant, if the plaintiff, by the want of ordinary care, and by his own voluntary act or acts, so far himself contributed to the producing of his own injury; that but for the fact of his doing so the injury to him would not have happened.

If, however, the railroad or its agents could, by ordinary care, have avoided the consequences of the negligence or want of care of the plaintiff—if he was negligent or careless, or, by the direct act of its agents, caused the act which produced the injury, the plaintiff then would be entitled to recover.

The real inquiry for you to make is: Were the circumstances under which the act was performed, in which the plaintiff received the injury of which he complains, such as to show a want of
57 that ordinary care and caution which might reasonably — been expected of a person of ordinary caution in the situation of the plaintiff at the time the injury was received; if so, he cannot

recover, whatever may have been the negligence on the part of the railroad or its agents.

But if a man of ordinary care and caution would have acted as the plaintiff did under the circumstances, taking into consideration the acts of the agents of the company, and the injury complained of by him was caused by the negligence or careless conduct or failure of duty on the part of the railroad company, its agents or employees, as has been hereinbefore explained to you, then the plaintiff is entitled to recover.

You are further instructed that if the railroad company, at the time of the injury complained of, had adopted and was following a general custom to give a signal before moving their passenger trains from stations, and this custom, at the time of the injury, was established, known, and acted upon by the public, and if the train
58 which injured the plaintiff was started without giving any such signal, and by reason of the failure to give a signal notifying persons that the train was about to move, the plaintiff, without failing to use that ordinary care which has been explained to you above as being his duty, was injured by the railroad train, then he would be entitled to recover.

You are further instructed that even though the plaintiff may have had no ticket authorizing him to travel on the train (and this is a question for you to decide) still if he was in the use of that ordinary case to have been expected of a person in his situation under the circumstances, and had no intention to defraud the company of his passage money, he was entitled to all the rights of a passenger.

If you believe from the evidence that since the plaintiff received the injury complained of, the Southern Pacific Railroad Company, by authority of the various acts of the Texas Legislature in evidence before you, (and you are instructed that these acts do authorize such consolidation,) has been merged in and consolidated
58½ with the present defendant, the Texas and Pacific Railway Company, and that since said consolidation, the present defendant has been, and is now, in the possession and use of all the property, rights, and franchises of the Southern Pacific Railroad Company, then the plaintiff is entitled to recover against the present defendant. If under the evidence and the above instructions he would have been entitled to recover against the Southern Pacific Railroad Company.

If the plaintiff be entitled to recover at all, he is entitled to recover the value of the time lost by him during the period necessary for his recovery, and while disabled from his injuries to work and labor, taking into consideration the value of his business, and the value of his services in conducting the same, and also to fair compensation for the mental and physical suffering caused by the injury, and the probable effect of the injury in future upon his health and his ability to labor and attend to his affairs, and generally, any reduction of his power and capacity to earn money and pursue the course of life which he might otherwise have done, not to
59 exceed, however, the sum of twenty thousand dollars.

While it was the duty of the railroad company to have

stopped its train at the station where the plaintiff was injured for a period of five minutes, yet if the train stopped there less than five minutes, it does not follow necessarily that therefore the defendant is liable in damages for the injury suffered by the plaintiff; nor, on the other hand, if the train stopped at said station for a period of five minutes, or even longer, would it necessarily follow that for that reason the railroad company would necessarily be freed or excused from liability for injury done to a person at their station. If, therefore, the train on the occasion of the injury here sued for, stopped at Jonesville less than five minutes, this would not have justified the plaintiff in attempting to get aboard the train when in motion—if said attempt was a want of that degree of care which might reasonably have been expected of a person in the situation of the plaintiff at the time, and under the circumstances then surrounding him, and if such were the facts, and his attempt to
60 get on the train was an act which materially contributed to his injury, then the plaintiff cannot recover.

But, if the train stopped at said station less than five minutes, and the failure of the train to stop that length of time, or a sufficient length of time to enable passengers with safety to get on and off, as herein before explained to you, resulted in the injury of which the plaintiff complains, and the plaintiff was guilty of no failure to use that degree of care which might reasonably have been expected of a person in his situation at the time of the injury, then the plaintiff is entitled to recover.

If you find for the plaintiff, you will return a verdict in the following form: We, the jury, find for the plaintiff ——— dollars against the Texas and Pacific Railroad Company; and you will fill the blank with the words indicating the amount you may find. If you find for the defendant you will simply say so.

A. J. BOOTY, *Judge.*

File: Charge of court. Filed Nov. 20th, 1880. A. R. Woodall, dis't cl'k. Jas. W. Pope, dep'y.

61 *Charge asked by Def't and refused. Filed Nov. 20th*, 1880. *Filed previously Nov. 17th*, 1879.

JAMES MURPHY *vs.* T. & P. R. R. Co.

The defendant asks the following charges be submitted to the jury:

1st. You are instructed that this is a case of such contributory negligence that the plaintiff cannot recover, because by his own admission, and other evidence in the cause, he had contributed directly and proximately to his own injury, and you must find for defendant.

2d. You are instructed that the plaintiff must prove that his injury was caused by the negligence of the defendant, and not by any direct negligence on his own part.

4th. If you believe from the evidence that the railroad had a suitable platform at Jonesville or other suitable place from and upon which passengers were to get on and off the cars, and if the plain-

tiff was not there, nor in sight of any officer of the train, and did not advise or in any way give notice to said officers that he desired to take passage on said train, but heedlessly attempted to
62 board said train while in rapid motion, then that he, the plaintiff, was guilty of such contributory negligence as will prevent his recovery.

5th. You are instructed that although the law requires that the train should stop at regular stations five minutes, yet if the plaintiff at the time of the injury was guilty of such negligence as a prudent and cautious man under like circumstances would have avoided in attempting to get on the train when in motion, it would make no difference whether the train stopped five minutes or not, and the plaintiff cannot recover by reason of the train failing to stop five minutes, if the plaintiff was likewise negligent at the same time, and if by the exercise of reasonable care and prudence on the part of plaintiff he, plaintiff, could have avoided the injury.

TURNER, CAMPBELL & STUART,
Att'ys for Def't.

MURPHY *vs* T. & P. R. R. Co.

6th. You are instructed that it makes no difference whether the platform was long enough for the whole train or not, the passenger has a right to require that the conductor shall
63 forward or back his train to the platform in order that he may get on and alight from the train, and if in this case the train stopped long enough at the station for the plaintiff to get aboard with safety, and the plaintiff was not at the place of said platform, but away at such a distance, and under such circumstances as not to notify the conductor that he desired to take passage on said train, then the defendant was not guilty of negligence in leaving plaintiff, but plaintiff was guilty of negligence in not giving notice, or advising conductor of his desire to get aboard.

TURNER, CAMPBELL & STUART,
Att'ys for Def't.

JAMES MURPHY *vs.* TEXAS & PACIFIC R. R. Co.

7th. The defendant asks the court to charge the jury as follows, being charge No. 7. The plaintiff in this case alleges that he had a ticket in his possession which he had received from one Hiatt, which authorized him to travel on defendant's road from Jones-
64 ville to Hallville. The court charges you that before plaintiff could lawfully enter defendant's cars by virtue of a ticket, he must prove to your satisfaction that he purchased or otherwise lawfully procured the ticket from the defendant, the railroad company, or from some one of its duly authorized agents to issue tickets; and further, that the relationship of carrier and passengers did not exist between defendant and plaintiff until he had procured his ticket from an authorized agent of the company; and further, the court charges you that if said relationship of carrier and passenger did not so exist at the time of the accident, then the defendant was

only bound to exercise ordinary care towards plaintiff, and is not held to the same high degree of care as if the plaintiff were a passenger.

TURNER, CAMPBELL & STUART,
Att'ys for Defendant.

The within special charges were asked by the defendant on the trial of this cause, and refused by the court, and the clerk of this court will file the same as part of the record in this cause.

A. J. BOOTY,
Judge 2d Judicial District.

File: Filed 17th Nov., 1879. J. L. Garrison, clerk. Filed Nov., 20, 1880. H. R. Wardall, dist. cl'k.

65 JAMES MURPHY *vs.* T. & P. R. R. Co.

The relationship of carrier and passenger does not exist between a person and a railway company until a person has put himself in the position provided by the company for the reception of passengers. If, therefore, the company had provided a platform for the use of persons getting on or off the trains, and the plaintiff, with the view of becoming a passenger, had put himself at the place for the reception of passengers, and by any fault of the company and no fault of his own he was injured, then the company is liable; but if the company had prepared a platform for the reception of passengers, then it was the duty of the plaintiff to get upon its train at the place so prepared, and the company had the right to expect that persons desiring to become passengers would be at the place prepared for their reception, and if the plaintiff attempted to get on board of the train at any other place, and without the knowledge and consent of the company, he did so at his own risk; and
66 if he attempted to board the defendant's train at any point except the point prepared, and while its train was in motion, and was injured thereby, the company is not liable.

Under the law the conductor was required to stop its train for five minutes at Jonesville, if that was a regular station of the company; and, if he failed to do so, he was liable to be punished under the law. But if he failed to stop his train for five minutes, and started his train in less time, and without giving any signal therefor, it was a wrong on the part of the conductor, but this wrong did not authorize the plaintiff to attempt to get on board the moving train; and if the train was moving at such a rate as made it dangerous for him to get upon the train, and if he did this without the knowledge and consent of the company or its servants, the company is not liable for any injury he sustained.

TURNER & STUART,
Att'ys for Def't.

If the company did wrong in moving its train before the proper time and without signal, this did not excuse the plaintiff from
67 doing an imprudent act on his part. If both parties are to

blame, the plaintiff cannot recover. If the plaintiff in any manner contributed to the injury he sustained, the company is not liable.

The question is not which was more to blame, the plaintiff or defendant, but the question is, did his act in any manner contribute to his injury, and if he did, he cannot recover.

TURNER & STUART,
Att'ys for Defendant.

No one is a passenger whether with or without a ticket, until he places himself in the position, or place prepared by the company for the reception of its passengers, and unless he was a passenger he cannot recover.

TURNER & STUART,
Att'ys for Def't.

If the train stopped long enough to allow the plaintiff to have gotten on the train, had he have been at the place prepared by the defendant for the reception of passengers, and he failed to get on board, but waited till the train began to move, and then
68 tried to get on at another place than that prepared for their reception, he cannot recover, even though the train did not stop five minutes.

TURNER & STUART,
Att'ys for Def't.

The foregoing instructions were asked by the defendant on the trial of this cause, and refused by the court, and the clerk of this court will file the same as part of the record in this cause.

Filed the 20th day of Nov., 1880.

A. J. BOOTY,
2d Judicial District.

File: Charge asked by defendant and refused. Filed Nov. 20th, 1880. A. R. Woodall, district clerk. Jas. W. Pope, d'p'ty.

Judgment and Verdict of the Jury.

JAMES MURPHY
vs.
THE T. & P. R. R. Co. } No. 5606.

On this the 20th day of November, A. D., 1880, came the plaintiff in person and by attorney, and the defendant by attorney, and it is agreed by and between plaintiff and defendant that the plaintiff's amended original petition filed herein, October the 30th, 1878, and his trial amendment filed herein Nov. 24th, 1879, shall
68½ be and constitute the plaintiff's pleadings in this cause without any objection thereto, for want of conformity to the rule on the subject, and the same are so recognized and received by the court, and defendant's general and special demurrers to said amended original petition, and to said trial amendment coming on to be heard, and the court having heard argument thereon, and having

duly considered the same, it is ordered and adjudged by the court court that said exceptions, general and special, all be overruled, to which defendant, in open court, excepts. And both parties having announced ready for trial, and a jury having been demanded, thereupon came a jury of good and lawful men, to wit: G. B. Conway, foreman, and eleven others, who, being duly tried, impaneled, and sworn, according to law, to try this case, after hearing the evidence and argument of counsel and receiving the charge of the court, retired to consider of their verdict; and after some time they returned into open court the following verdict, to wit: We, the jury, find for the plaintiff nine thousand dollars against the Texas and Pacific Railroad Company. G. B. Conway, foreman. It is therefore
69 ordered, adjudged, and considered by the court that the plaintiff, James Murphy, do have and recover of the defendant, The Texas and Pacific Railway Company, the sum of nine thousand dollars, together with all costs herein incurred, for which let execution issue, to all of which defendant excepts, and gives notice of appeal to the supreme court of Texas.

Bill of Exceptions. Filed 27 *Dec.*, 1880.

In District Court, Harrison County. Fall Term, 1880.

JAMES MURPHY *vs.* T. & P. R. R. Co.

Be it remembered that on the trial of the above-entitled cause the plaintiff offered to prove the following facts, viz., by witness Vanness: Plaintiff asked if it was usual or customary for persons to get on moving trains, to which he answered that he had seen persons do it to avoid being left. The defendant objected to the question and answer, because—

1st. It is entirely immaterial unless the act was done or the custom established with the knowledge of the company.

2d. Because the fact of any number of persons doing an imprudent or dangerous act will not authorize the defendant in so acting.

70 3d. Because the pretended custom is not limited to the conduct of passengers at Jonesville station.

The court overruled the objections, the defendant excepted to said ruling and herewith tenders his bill of exceptions, and asks that the same may be signed, sealed, and made part of the record in said cause, which is accordingly done.

Approved. A. J. BOOTY, *Judge.*

File: Filed 27th day Dec., 1880. A. R. Woodall, clerk. By Jas. W. Pope, deputy.

2d Bill of Exceptions.

In the District Court Harrison County. Fall Term, 1880.

JAMES MURPHY *vs.* T. & P. R. R. Co.

Be it remembered that on the trial of the above-entitled cause the plaintiff offered to prove the following facts, viz:

By the witness, William Stedman, that a consolidation was effected between the Texas Pacific Railroad Company and The Southern Pacific Railroad Company on the second day of March, 1872; to which the counsel for the defendant objected, for the following reasons, viz:

1st. Because the proposed evidence was hearsay.

71 2d. Because if there were such a consolidation the act of consolidation was the best evidence.

3d. Because the proposed evidence was the opinion of the witness as to whether there was a consolidation.

And the court overruled the objection: the defendant excepted to said ruling, and herewith tenders his bill of exceptions, and asks that the same may be signed, sealed, and made a part of the record of this cause, which is accordingly done.

Approved. A. J. BOOTY, *Judge.*

File: Filed 27th Dec., 1880. A. J. Woodall, clerk. By Jas. W. Pope, dep'ty.

3d Bill of Exception.

In District Court Harrison County. Fall Term, 1880.

JAMES MURPHY *vs.* T. & P. R. R. Co.

Be it remembered that on the trial of the above-entitled cause the following proceedings were had: The defendant filed in the court its petition to remove this cause to the hon. U. S. circuit court of the United States of America for the eastern district

72 of Texas, and filed its bond, which was approved by the court, conditioned as required by law; which petition coming on to be heard and considered by the court, was by the court overruled, and said court refused to make its order removing this cause to the hon. circuit court of the United States as aforesaid.

To which ruling of the court the defendant in open court excepted, and defendant refers to the petition for removal, and the bond and order of the court as part of this exception, and herewith tenders his bill of exceptions, and asks that the same may be signed, sealed, and made part of the record in said cause, which is accordingly done.

Approved. A. J. BOOTY, *Judge.*

Filed 27th day of Dec., 1880. A. R. Woodall, cl'k. By Jas. W. Pope, dep'y.

4th Bill of Exceptions.

JAMES MURPHY *vs.* TEXAS & PACIFIC R. R. Co.

Be it remembered that on the trial of the above-entitled cause the plaintiff offered to prove the following facts, viz: That passen-

sengers were accustomed to get off and on trains on the north

73 side of track, where Murphy tried to get on. (This proof by Knox.) To this the defendant objected.

1st. Because it is immaterial, unless it is further shown that they did so with the consent of the company or its agents.

2d. Because a custom acted on by individuals could not bind the company, unless it is shown that a suitable place to get on and off trains had not been prepared by the company; and the court overruled the objections. The defendant excepted to said ruling, and herewith tenders his bill of exceptions, and asks that the same may be signed, sealed, and made a part of the record in said cause, which is accordingly done.

Approved. A. J. BOOTY, *Judge.*

File: Filed Dec. 27th, 1880. A. R. Woodal, clerk. Jas. W. Pope, dep'ty.

5th Bill of Exceptions.

In District Court, Harrison County. Fall Term, 1880.

JAMES MURPHY *vs.* T. & P. R. R. Co.

Be it remembered that on the trial of the above-entitled cause the plaintiff offered to prove the following facts, viz: The plaintiff offered in evidence the following special acts of the Texas
74 Legislature, viz., an act approved on the — day —— 187–, entitled an act to ——

Also an act approved on the — day of — 187—, entitled an act—

For date of acts, see Statement of Facts.

To which the counsel for the defendant objected for the following reasons, viz:

1st. Because the acts in their bearing on this case are hearsay.

2d. Because the acts only express what the opinion of the Legislature was on the matters at issue.

3d. Because said acts show upon their face that they are only secondary evidence, and that there exists other and better evidence in the office of Secretary of State.

And the court overruled the objections, the defendant excepted to said ruling, and herewith tenders his bill of exceptions, and asks that the same may be signed, sealed, and made a part of the record in said cause, which is accordingly so done.

Approved. A. J. BOOTY, *Judge.*

File: Filed 27th day Dec, 4880. A. R. Woodall, cl'k. Jas. W. Pope, dep'ty.

75 *6th Bill of Exceptions.*

In the District Court, Harrison County. Fall Term, 1880.

JAMES MURPHY *vs.* T. & P. R. R. Co.

Be it remember that on the trial of the above-entitled cause, the following proceedings were had:

James Murphy was a witness in his own behalf, and testified that when the train reached Jonesville he was standing with his back to the train talking to Dr. Knox; that no signal of departure was given; that he turned to look at the train, and it was standing still; that he broke and run for the train; that the train started

after he started to run to it; that he heard no bell or other signal; that when he turned to look at the train he started in a run to get aboard; that he heard and saw no signal of departure.

On cross-examination he was asked this question: If no signal of departure was given, and the train was still when you turned to look at it, why did you start to run?

To which he answered, I was afraid of being left.

He was asked further what happened at the train to make
76 him think he would be left?

To which he answered, I was afraid the train would start. He was then asked what made him afraid, if he heard no signal, and the train was standing still, and had he not been there the usual time, what made him start in a run? To which he replied, I was afraid of being left. The question was again put to have him tell what made him start in a run, to which he continued to answer, I was afraid of being left. The defendant's attorney then appealed to the court to force the witness to answer the question, and again put it to the witness, but the court declined to make the witness answer the question further than as above stated, and refused to let the question be again put to him, and required the attorney to proceed with whatever other questions he had for said witness, and the defendant excepted to said ruling, and herewith tenders his bill of exceptions, and asks that the same may be signed, sealed, and made a part of the record in said cause, which is accordingly so done.

I approve the foregoing bill of exceptions, and state that
77 I allowed the question to be propounded to *to* the witness not less than a dozen times, and perhaps oftener than that, and every time answered about as stated in the bill, and finally I sustained an objection made by the counsel of the plaintiff to the question being again propounded.

A. J. BOOTY,
Judge 2d Judicial District.

File: Filed 27th day of Nov., 1880. A. R. Woodell, clerk. By Jas. W. Pope, dep'ty.

Bill of Exceptions.

In District Court, Harrison County. Fall Term, 1880.

JAMES MURPHY
vs.
T. & P. & S. P. R. R. Co. } 5606.

Be it remembered that on the trial of the above entitled cause, the defendant presented a general demurrer to the plaintiff's petition, and presented his motion for a new trial, both which the court overruled, and defendant excepted to said ruling, and herewith tenders his bill of exceptions, and asks that the same be signed, sealed,
and made a part of the record in said cause, which is accord-
78 ingly so done.

Approved. A. J. BOOTY, *Judge.*

File: Filed 27th day Dec., 1880. A. R. Woodall, clerk. By Jas. W. Pope, dep'ty.

Motion for New Trial. Filed Nov. 22d, 1880.

In the District Court, Harrison County.

JAMES MURPHY *vs.* THE T. AND P. R. R. Co.

And now comes the defendant and moves the court to grant a new trial in this case, for the following causes:

1st. The court erred in not presenting to the jury in the charge in a full and satisfactory manner the true issues as formed by the pleadings, and thereby the jury were misled, in this: The court having undertaken to state said issues, omitted, amongst other things, the allegations in plaintiff's petition, that plaintiff went immediately to said train, being near thereto, immediately tried to get aboard, &c.; that plaintiff was ready and waiting to go aboard thereof, and was standing convenient to the entrance of said cars of said train, awaiting the signal to be given, &c., and
79 the special and express denial of these allegations by defendant in its answer, averring that "plaintiff was at a grocery, entirely off defendant's right of way, &c., and remained standing there until after said train started, more than sixty (60) feet from defendant's tracks," &c.

2d. The charge of the court was in some material respects ambiguous, not clear and explicit, and tended to confuse and mislead, and did mislead, the jury, in this: The first instruction states in a general way that "it is the duty of the R. R. company to stop its passenger trains five minutes, and longer, if necessary, to enable passengers with safety to get on and off, the passengers using reasonable diligence to do so," &c. The court then dismisses the subject of the five minutes law, and does not refer to it again in the whole course of the charge, whereas we insist that the court should then and there, or in some portion of the charge immediately connected with the instructions as to said five minutes law, have instructed the jury that, although defendant was required to
80 stop its said trains five minutes, or longer, if necessary, yet, if the jury should not believe that such failure to stop five minutes was the proximate and direct cause of the plaintiff's injury, but that his injuries were occasioned by his own negligence, &c., then to find for defendant; and in this connection we submit that the court erred in not giving to the jury the fifth (5th) instruction asked by defendant, and in this connection the court should have cleary defined to the jury the law of contributory negligence—the not stopping five minutes being the only negligence of defendant.

3d. The court erred in its charge to the jury in reference to the ticket, alleged by plaintiff that he had, authorizing him to travel over defendant's road, and not clearly submitting to the jury the true rule of the relationship of carrier and passenger, and should have defined to the jury that to constitute that relation the person apply-

ing to travel, before the R. R. Co. could be held to the highest degree of diligence and care towards such person, such person
81 should either have a ticket issued by competent authority, or should have taken his place in the cars without objection from the R. R. Co., or its employees, and in this connection the court erred in not giving to the jury the 3d charge asked by defendant.

4th. We respectfully submit that the whole charge taken together mislead the jury, in this, that nearly, if not quite every clause of the charge kept prominent before the jury, the right of the plaintiff to recover, never in express terms stating that under any circumstances the jury could find for the defendant, except to submit in a general way at the close of the charge that if the jury found for defendant they would say so, leaving it to mere inference that the jury might find at all for defendant.

5th. The court erred in submitting to the jury questions of law, or in charging conclusions of law without instructing the jury as to the purport and meaning of such conclusions when applied to the facts of the case, and in stating said conclusions
82 of law, failing to follow up in immediate and proper connection, with instructions as to the proper applicability of such conclusions to the case before the jury, and thus whilst giving abstract propositions, correct in themselves, mislead the jury by reason that the said propositions were not applied to the case at the time and in immediate connection with such propositions of abstract law stated, in this, the court uses the term "negligence" throughout the charge, without defining it to the jury, and in stating that the fault or negligence of plaintiff must be such a degree as to amount to want of reasonable care on *his* part under the circumstances at the time of the injury. The true legal proposition properly defined, of which would have been to state such want of ordinary care, as men of ordinary prudence would have done under the circumstances.

6th. There was error in the charge in submitting the proposition to the jury as applied to the facts of the case about which the evidence was not conflicting, was clear and uncontradicted,
83 the whole testimony showing beyond controversy that the plaintiff was not at the place where he should have been to get on the cars. That no signal is ever given to notify passengers that trains are about to start, and especially no such duty to the plaintiff, as he was unquestionably out of the way, talking to another person upon a different business, and was not near the platform or the place where the passenger car was standing, and where passengers got on and off; and that, under these circumstances, he attempted to board the train in rapid motion, as proved by the witnesses, was gross negligence on his part, and in the connection we submit that the court erred in not submitting to the jury instruction No 1, asked by defendant.

7th. The court erred in not submitting to the jury that railroad companies are held to the greatest care and prudence in providing for the safety of passengers, &c., in this: that the court should have

defined to the jury what it takes to constitute a passenger, and the relationship of carrier and passenger, and should have stated in that connection that if plaintiff was not such passenger, and such relationship of carrier and passenger did not exist as so de-
84 fined, then the railroad company was only chargeable with ordinary care towards plaintiff, &c.; and in connection with the charge, it was error in the court to omit giving a charge as to the ticket aforesaid immediately with the charge, or should have given the instruction No. 3, asked by defendant as aforesaid.

8th. The court erred in submitting to the jury an instruction as to a point on which there was no evidence, to wit, as to the damages sustained by plaintiff, and especially when instructing the jury as to measure of damages; the court says he is entitled to recover the value of the time lost by him during the period necessary for his recovery and while disabled from his injuries, taking into consideration the value of his business and the value of his services in conducting the same; there being no proof before the jury to sustain the charge, and no allegations in plaintiff's petition as to the value of his time, or the expenses he incurred while disabled.

9th. The court erred in refusing to submit to the jury all the various charges asked for by defendant.

10th. Because the damages assessed by the jury in their verdict are excessive.

85 11th. Because the verdict of the jury is contrary to law, and to the charge of the court as shown in the above stated reasons for new trial; and further, that the jury wholly disregarded the charge of the court in reference to what constituted the supposed negligence of the defendant, and the proximate and direct negligence of the defendant contributing to his injuries, and without which the accident would not have occurred.

12th. The verdict of the jury was contrary to facts, in this, that the evidence clearly shows that the plaintiff was not a passenger on defendant's road, and that defendant was not held to the high degree of care as is required for passengers, and the evidence already showed that plaintiff was not at the place usual and designated for getting on and off the cars as alleged by him, but was away from said place, as alleged by defendant, and shown by the proof; and further, that it was by the direct and proximate negligence of plaintiff and not by the direct and proximate negligence of defendant that the accident occurred, and if the proof showed mutual neg-
86 ligence of plaintiff and defendant, it was by the proximate contributory negligence of plaintiff and the remote negligence of defendant that produced the injury complained of.

13th. The court erred in not removing the cause to the Federal court upon application of defendant.

Wherefore the defendant prays the court to grant them a new trial.

TURNER & STUART,
For Defendant.

File. Motion for new trial. Filed Nov. 22d, 1880. C. R. Woodall, clerk. By Jas. W. Pope, dep'ty.

Judgment on Motion for a New Trial.

JAMES MURPHY
vs.
THE SOUTHERN PACIFIC R. R. Co. and THE TEXAS & PACIFIC R. R. Co.

On this the 11th day of December, 1880, came on to be heard the motion of defendant for a new trial in this cause, which motion being considered by the court and argument heard thereon is overruled, to which ruling of the court the defendant excepts, and gives notice of appeal to the Supreme Court.

87 *Assignment of Errors.*

In the District Court of Harrison county, Texas, Fall Term, 1880.

JAMES MURPHY
vs.
THE SOUTHERN PACIFIC RAILROAD Co. and TEXAS & PACIFIC R. R. Co.

And now comes the said defendant and assigns the following errors committed by the district court of Harrison county on the trial of this cause:

1st. The court erred in overruling the defendant's general demurrer to the plaintiff's petition.

2d. The court erred in allowing the witness, Vanness, to answer the question propounded by plaintiff's counsel as to whether it was usual and customary for persons to get on moving trains.

3d. The court erred in admitting the testimony of the witness, Knox, as to whether persons were accustomed to get on and off trains on the north side of the track where Murphy attempted to get on.

88 4th. The court erred in not requiring the witness, Murphy, to answer the question propounded by defendant's counsel, as follows: If you heard no signal, and the train was standing still, and had not been there the usual length of time, what made you start in a run?

5th. The court erred in allowing the plaintiff to prove by the witness, Stedman, that the Southern Pacific Railroad Company and the Texas & Pacific Railroad Company, were consolidated in March, 1872.

6th. The court erred in allowing and admitting in evidence the acts of the Legislature, entitled, 1st, an act to encourage the speedy construction of a railroad through the State of Texas to the Pacific Ocean, passed May 24th, 1871, and, 2d, an act to adjust and define the rights of the Texas & Pacific Railway Company with the State of Texas, in order to encourage the speedy construction of a railway through the State to the Pacific ocean, passed May 2d, 1873.

7th. The court erred in not removing this cause to the Hon. U.

S. district court of America for the eastern district of Texas, upon the petition and bond filed by defendants.

89 8th. The court erred in not allowing and submitting all the special charges asked by defendant.

9th. The court erred in not defining to the jury what constituted a person a passenger, and what did not. The court erred in its charge in not defining to the jury the relationship between passenger and carrier, and in not explaining to the jury the degree of care a railroad company is held to exercise toward one who is a passenger and one who is not. The court erred in overruling defendant's motion for a new trial.

10th. The court erred in leaving it as a fact entirely for the jury whether the plaintiff in this case had been guilty of contributory negligence.

11th. The court erred in overruling the defendant's motion for a new trial upon the grounds therein stated.

TURNER & STUART,
Att'ys for Defendant.

Filed: Assignment of Errors. Filed with appeal bond 19th Jan., 1881. Alex. S. Field, district cl'k, H. co.

Transcript demanded by appellant, this Jan. 19th, 1881.

90 JAMES MURPHY
vs.
THE SOUTHERN PACIFIC R. R. CO. AND THE TEXAS & PACIFIC R. R. CO.

Whereas James Murphy recovered against the Texas & Pacific Railroad Company, on the 20th day of Nov., 1880, before A. J. Booty, of the 2d judicial district for the State of Texas, in the district court of Harrison county, the following judgment, to wit:

Appeal Bond. Filed 19th Jan., 1881.

JAMES MURPHY
vs.
TEXAS & PACIFIC R. R. Co. } No. 5606.

On this 20th day of November, A. D. 1880, came the plaintiff in person and by attorney, and the defendant by attorney, and it is agreed by and between the plaintiff and defendant that the plaintiff's amended original petition, filed herein Oct. 30th, 1878, and his trial amendment, filed herein Nov. 14, 1879, shall be and constitute the plaintiff's pleadings in this cause without any objections thereto for want of conformity to the rules on the subject, and the same are so recognized and received by the court, and the defendant's ex-

91 ceptions, general and special, to said amended original petition and to said trial amendment coming on to be heard, and the court having heard argument thereon, and having duly considered the same, it is ordered, adjudged, and decreed by the court that said exceptions, general and special, all be overruled, to which defendant in open court excepts, and both parties having announced

ready for trial, and a jury having been demanded, thereupon came a jury of good and lawful men, to wit, G. B. Conway, foreman, and eleven others, who, being duly tried, empaneled, and sworn according to law, to try this case, after hearing the evidence and argument of counsel, and receiving the charge of the court, retired to consider of their verdict, and after some time they returned into open court the following verdict, to wit: We, the jury, find for the plaintiff nine thousand dollars against the Texas & Pacific R. R. Co.—G. B. Conway, foreman. It is therefore ordered, adjudged, and considered by the court that the plaintiff, James Murphy, do have and recover of the defendant, the Texas & Pacific Railway Com-
92 pany the sum of nine thousand dollars, together with all costs herein incurred, for which let execution issue, to all of which defendant excepts and gives notice of appeal to the supreme court of Texas; and defendant having filed its motion for a new trial in this cause, and the same being overruled by the court, and the defendant having given notice of appeal in open court, has appealed this case to the supreme court of Texas.

Now, therefore, we, the Texas and Pacific Railroad Company, as principal, and —— ——, as sureties, acknowledge ourselves bound to pay to James Murphy the sum of twenty thousand dollars, conditioned that the Texas and Pacific Railroad Company, appellant, shall prosecute its appeal with effect, and in case the judgment of the Supreme Court shall be against it, that it shall perform its judgment, sentence, or decree, and pay all such damages as said court may award against it.

Witness our hand, this 15th day of January, A. D. 1881.

TEXAS AND PACIFIC R. R. CO.,
Per TURNER & STUART, *Attorneys.*
JOHN C. BROWN.
GEO. NOBLE.
JNO. R. MOHONE.
L. KOHN.
A. KOHN.

93 Approved this Jan. 19th, 1881.
AL'X S. FIELD, *Dist. Clerk H. Co.*

File: Appeal bond, filed with assignment of errors, this Jan. 19th, 1881. Alex. S. Field, district cl'k, Harrison co.

94 *Cost Bill.*

JAMES MURPHY *vs.* TEXAS AND PACIFIC R. R. Co.

Plaintiff's cost:

To C. E. BALLS, *District Clerk*, Dr.

To fil. and doc., 40; cop. petition, $1.50	$1	90
2 cit., 1.50; fil. subs. petition, 15	1	65
cop. same, and fil. and pet. and copy	2	60
2 cit., 1.50; order to amend, 75	2	25
2 affid'v'ts for witnesses		50
entering rule, 1.00; order to substitute, 75	1	75
continuance		25
	$10	90

To clerk, W. C. Pierce, affid'v't, 50; fil. 5 papers, 75	$1 25	
court for service, 50; leave to amend, 75	1 25	
file amend'd 15; sub. 1 wit., 30	45	
ord. to amend, 75; 3 witnes. af'd'v'ts, 1.50	2 25	
		$5 20
cl'k, J. P. Lynch, ord. to amend, 75	75	
fil. amend., 15	15	
		90
cl'k, Garrison, Jno. L., court, 20	20	
sub. 4 wit's, 70; sub. 4 wit's, 70	1 40	
Fil. excep., 15; 1 sup. ans., 15; sub. 3 wit's, 55	85	
Sub. 3 wit., 55; fil. trial amend., 15	70	
1 sup., 25; 1 sub., 25; leave to amend. sup., 75	1 25	
Sub. 1st wit., 1.05; 2 wit. af'd'v't, 50	1 55	
Fil. mandate and opinion, 30	30	
		6 25
		23 25

95 Plaintiff's cost continued:

Amt. clerk's cost forward		$25 25
Sheriff W. H. Poland, ex. orig. cit		1 50
" S. H. Russell, ex. cit., $3.00; ex. sub., $1.90		4 90
" Perry, S. R., ex. sub, $6.00; ex. do., $6.00	$12 00	
" Perry, S. R., ex. sub., $6.00; ex. do., $4.50	10 50	
" Perry, S. R., ex. sub., 70; ex. do., $6.50	7 10	
		29 60
Witness C. Knox, $15.42, $12.20, $19.60, $13.92, $6.92	68 06	
" C. Knox	16 40	
		84 46
" Jas. Estes		46 96
Total plaintiff's cost		160 69

Defendant's Costs.

To cl'k C. E. Balles, fil. ans. and amd	30	
To sub. 2 wit., 45; sub. 1, 30	75	
		1 05
Clerk W. C. Pierce, sub. 5 wit., $1.05; affid'vt and fil., 65	1 70	
Subp. 12 wit., 2.10; order on, less ans., 75; cost, 20	3 10	
Fil. sub. ans., 15; subp. 1 wit., 30	45	
Subp. 1 wit., 30; fil. charge, 15; emp. jury, 75	1 20	
Ent. jud., 75; fil. mo. new trial, 15	90	
Order on same, 75; fil. refuse charge, 15	90	

Fil. bill exc. and stat. facts, 30	$0 30	
Fil. appeal bond, $1.65; fil. assig't errors, 15	1 80	
Transcript, $34.00; 2 aff'd'vt wit., $1.00	35 00	
		$45 35
Clerk J. P. Lynch, fil. aps. for sub. and removal, 30	30	
Fil. bond to remove, 15; order on petition to rem., 75	90	
		1 20
Clerk J. L. Garrison, 1 sub., 25; fil. sub. ans. and ch'rg, 30	55	
Emp. jury, 35; rec. and record verdict, 35	70	
Fil. judgment, 75; fil. ch'rg refused, 15	90	
Fil. motion new trial, 15; ord. on same, 75	90	
Sub. 7 wit., $1.05; 4 af'd'vt for wit., $1.00	2 05	
		5 10
		52 70
96 Am't defendant's cost forward		52 70
Clerk Wardall, sub. 3 wit., 55	55	
Fil. 2 ame'd pet., 15; fil. ch'rg and ref. ch'r, 30	45	
Emp. jury, 35; rec. and rec. verdict, 35	70	
End. jud'mt, 75; fil. and doc. mo. new trial, 30	1 05	
Ord. on mo. new trial, 75; fil. of bills, ex., $1.05	1 80	
		4 55
Clerk A. S. Fields, aff'd'vt wit., 25	25	
Ord. to fil. stat. facts, 75; fil. same, 15	90	
Fil. ass. errors, 15; fil. and ac. appeal bond, $1.65	1 80	
Transcript	50 00	
		51 95
Sheriff W. H. Poland, ex. sub		50
S. H. Russell, ex. sub., $4.20; ex. sub., $11.40	15 60	
" " 6, $15	15 00	
" " $2.60	2 60	
		33 20
L. R. Perry, " $6.60		6 60
Witness C. Knox		12 20
" Jas. Estes		38 64
" A. F. McAllister		43 60
		$244 94

Test:

ALEX. S. FIELD,
Cl'k District Court, H. Co., Texas.

97 THE STATE OF TEXAS, *Harrison County:*

I, Alex. S. Field, clerk of the district court, Harrison county, Texas, do hereby certify that the foregoing ninety-five pages contain a true copy of all the proceedings in the cause of James

Murphy *vs.* Texas and Pacific Railway Company, No. 5606, in said district court.

In testimony whereof, I hereto sign my name and affix the seal of said district court at office in Marshall, this Nov. 7th, 1881.

ALEX. S. FIELD,
Cl'k D. C. Harrison County.

98 *Opinion of the Supreme Court Affirming Judgment of the Court below.*

Appeal From Harrison County.

TEXAS AND PACIFIC RAILWAY COMPANY
vs.
JAMES MURPHY. } 4708.

The court below correctly refused to remove this cause into the circuit court of the United States for the eastern district of Texas, upon the application of the appellant.

This point has been already decided during the present term in the case of The Texas and Pac. Ry. Co. *vs.* McAllister. The only difference between that case and the present one is: the application for removal in the McAllister case was not verified by affidavit whereas in this it was sworn to as prescribed by the statute under which the removal was sought. The reasoning upon which that decision proceeds, would have justified a refusal of the application if sworn to, and in all other material respects it is similar to the one now under consideration.

The statement of facts in this case was not made out, signed by the judge or filed during term time, and there was no order of count entered up, allowing this to be done after final judgment.

For this reason the errors assigned as to the charges given or refused by the court below, can not be considered here.

99 Armstrong *vs.* Lipscomb, 11 Tex., 649.
Cannovan *vs.* Thompson, 12 Id., 247.
Brige *vs.* Wanhup, 23 Id., 670.

For the same reason we cannot revise the action of the court in admitting or rejecting evidence offered by the parties.

There is nothing in the record to make it appear that the testimony offered by appellant and rejected was important and that its place was not supplied by other evidence.

Thompson *vs.* Griffin, 24 Tex., 438.
Hutchins *vs.* Wade, 20 Tex., 7.

We cannot determine from the record whether or not the evidence admitted over the objections of the appellant produced a substantial injury to it, as we have no means of knowing what connection this evidence had with other facts of the case as proved upon the trial. "It may have been comulative or anxiliary to the main facts in proof to such an extent only as that it could not be reasonably supposed to have influenced the verdict of jury."—McCarty *vs.* Wood, 42 Tex., 38.

For the same reason we cannot revise the supposed error of the

court in refusing to compel the witness Murphy to answer
100 more specifically the question propounded by the counsel for the company.

We cannot see what connection it had with the other facts of the case, nor that his answers could have influenced the verdict of the jury, no matter how definitely they might have been given.

The only other error assigned which we can consider in the state of the record as brought to this court, is the first which relates to the action of the court in overruling the general demurrer.

It is unnecessary for us to consider the several questions raised in appellant's brief under this assignment, because they have all been decided favorably to the appellee in this very cause when it was before this court upon a former appeal, (46 Tex., 356.) We have no disposition to re-open these questions so thoroughly considered upon that appeal.

The decision then made is the law of the case, and the authorities now cited in opposition to it do not, in our opinion, shake its authority.

WILLIE, *Chief Justice.*

101 Be it remembered, at a term of the Hon. supreme court of the State of Texas, was begun and holden at Austin on the 1st Monday of April, A. D. 1883. Present: Hon. A. H. Willie, chief justice, and Associate Justices Stayton and West in the cause.

Judgment Supreme Court.

Appeal from Harrison.

THE TEXAS AND PACIFIC RAILROAD COMPANY, *vs.* JAMES MURPHY. } No. 1111.

The following judgment was rendered, to wit, May 29, 1883:

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this court that there was no error in the judgment, it is, therefore, considered, adjudged, and ordered that the judgment of the court below be in all things affirmed, that the appellee, James Murphy, do have and recover of the Texas and Pacific Railroad Company, and its sureties, Jas. C. Brown, Jno. R. Mahone, L. Kahn, and A. Kahn, the amount adjudged below, together with all costs in this behalf expended, and this decision be certified below for observance.

I, Chas. S. Morse, clerk of the supreme court of Texas, at the city of Austin, hereby certify that the foregoing is a true
102 copy of the judgment made by this court in the above entitled and numbered causes.

In witness whereof I hereunto set my hand and affix the seal of said court, at Austin, this 1st day of September, A. D. 1883.

[SEAL.] CHAS. S. MORSE, *Clerk.*
By G. P. WELLONS, *D'p'ty Clerk.*

Opinion of Sup. C't on Motion for Rehearing.

THE TEXAS AND PACIFIC R'Y CO., Appellant,
vs.
JAMES MURPHY, Appellee. } No. 1111.

We have carefully examined the application for a rehearing, together with the accompanying exhibits filed by the respective parties in support of and in opposition to the motion, and under all the controverted facts outside of the transcript upon which we are asked to pass, and the peculiar circumstances of the case. We are of the opinion that a due regard for the orderly dispatch of business, and for these general rules adopted for the purpose of enabling us to see from the record itself the merits of every case presented for our consideration, requires the motion to be overruled, and it is accordingly so ordered.

STAYTON, *Associate Justice.*

103 FRIDAY MORNING, *Dec.* 21, 1883.

Court met pursuant to adjournment. Present: Chief Justice Willie and Associate Justices Stayton and West.

Order of Sup. C't Overruling Motion for Rehearing.

Appeal from Harrison.

THE TEXAS AND PACIFIC RAILROAD COMPANY
vs.
JAMES MURPHY. } No. 422. Case 1111.

Opinion of the court delivered by Mr. Justice Stayton.

Mr. Chief Justice Willie not sitting in this cause, motion of the appellant for a rehearing in this cause came on to be heard, and the same having been considered by this court, it is ordered that the motion be overruled and the rehearing refused; that the appellant, The Texas and Pacific Railway Company, pay all costs of this motion.

104 *Petition for Writ of Error. Filed in Sup. Court Jan'y* 9, 1884.
S. D. Reaves, Clerk.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Appellant,
vs.
JAMES MURPHY, Appellee.

To the honorable the chief justice of the supreme court of Texas:

Now comes the Texas and Pacific Railway Company—not a banking, but a railroad corporation, incorporated by virtue of certain acts of Congress of the United States, viz.: "An act to incorporate the Texas & Pacific Railway Company, and to aid in the construction of its road and for other purposes," approved March 3d, 1871, and an act supplementary thereto, approved May 2, 1872—by Maxey and Fisher, its attorneys, and complains that in the

record and proceedings, and also in the rendition of a judgment in a suit between James Murphy, plaintiff, and the Texas and Pacific Railway Company, defendant, in the supreme court of the State of Texas, on appeal from the district court of Harrison county, in said State, said supreme court being the highest court of law or equity of said State, in which a decision could be had in said suit, and in which a final judgment was rendered against the Texas and Pacific Railway Company on the 21st day of December, A. D. 1883,
105 in said suit, wherein was drawn in question the construction of certain statutes of the United States authorizing the removal of suits begun in a State court to the proper circuit court of the United States, and the said judgment and decision was against the rights and privileges specially set up and claimed under such statutes by petitioner, all of which appears in the record and proceedings in said suit herewith presented for your honor's inspection, manifest error hath happened to the great damage and injury of the Texas and Pacific Railway Company, wherefore it prays for an allowance of a writ of error in said cause from the Supreme Court of the United States to the said supreme court of the State of Texas, and for such other process as may cause said judgment and decision to be corrected by the Supreme Court of the United States.

THE TEXAS AND PACIFIC RAILWAY COMPANY.
By MAXEY & FISHER,
Its Attorneys.

The prayer of the petition is granted, this 3d day of January, A. D. 1884.

A. H. WILLIE,
Chief Justice Sup. Ct., Texas.

106 *Writ of Error Bond. Filed Jan'y 9th*, 1884. *S. D. Reaves, Cl'k.*

THE TEXAS AND PACIFIC RAILWAY COMPANY *vs.* JAMES MURPHY.

Know all men by these presents, that we, The Texas and Pacific Railway Company, as principal, and J. T. Brackenridge and R. J. Brackenridge, as sureties, are held and firmly bound unto James Murphy in the sum of fifteen thousand dollars, to be paid to the said James Murphy, his executors or administrators; to the payment of which, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our, successors and assigns, executors and administrators, firmly by these presents. Sealed with our seals and dated this 31st day of December, A. D. 1883.

Whereas the above named The Texas and Pacific Railway Company hath prosecuted a writ of error from the Supreme Court of the United States, to the supreme court of the State of Texas, to reverse the judgment rendered in the above entitled cause by the supreme court of Texas. Now, therefore, the condition of this ob-

ligation is such, that if the above named The Texas and Pacific Railway Company shall prosecute its said writ of error to effect,
107 and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
By MAXEY & FISHER, *Its Attorneys.*
J. T. BRACKENRIDGE. [SEAL.]
R. J. BRACKENRIDGE. [SEAL.]

Sealed and delivered in the presence of—
S. R. FISHER.
J. M. THORNTON.

UNITED STATES OF AMERICA, *Western District of Texas:*

J. T. Brackenridge and R. J. Brackenridge, being duly sworn, depose and say, and each for himself saith, that he is worth the sum of fifteen thousand dollars, over and above the amount of his debts, and that he has property in this State, exclusive of all legal exemptions, subject to execution, amounting to fifteen thousand dollars and upwards.

J. T. BRACKENRIDGE.
R. J. BRACKENRIDGE.

THE STATE OF TEXAS, *County of Travis:*

Severally subscribed and sworn to before me, the undersigned authority, by the above named J. T. Brackenridge and R. J. Brackenridge, each for himself and in person, this 31st day of December, A. D. 1883. Witness my hand and seal of office, this 31st day of December, A. D. 1883.

[SEAL.] J. M. THORNTON,
Notary Public, Travis Co., Texas.

108 Examined and approved by me, this 3d day of January, 1884.
A. H. WILLIE,
Chief Justice Supreme Court of the State of Texas.

109 The State of Texas to the sheriff or any lawful officer of Harrison county, Greeting:

You are hereby commanded to serve with the copy of citation hereto attached, James Murphy, or his attorneys of record, N. A. Stedman, Geo. A. Hill, and A. Pope, instanter, if to be found in your county; and herein fail not, under the penalty prescribed by law, but make due return hereof, showing how and when such service was made.

Witness the Hon. A. H. Willie, chief justice of our supreme court, with the seal thereof attached, this Jan'y 14, 1884.

[SEAL.] S. D. REAVES, *Clerk.*

109½ Came to hand January 16th, 1884, at 9 o'clock a. m., and executed January 16th, 1884, by delivering to A. Pope in per-

son, one of the attorneys for the defendant in error, the accompanying certified copy of citation in the case of the Texas and Pacific Railway Company *vs.* James Murphy, No. 1111.

S. R. PERRY,
Sheriff Harrison County, Texas.

Sheriff's fee	$1 50
Mil.	10
	$1 60

Endorsed: No. 1111. The T. & P. R'y Co. *vs.* James Murphy. Precept. Issued Jan'y 14, 1884. S. D. Reaves, clerk.

110 *Citation. Filed Jan'y* 9, 1884

The United States of America to James Murphy, or his attorneys of record, Messrs. N. A. Stedman, A. Pope, and Geo. A. Hill, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Texas, wherein The Texas and Pacific Railway Company is plaintiff in error and you, James Murphy, are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ mentioned, should not be corrected, and why speeky justice should not be done to the parties in that behalf.

Witness the Honorable Asa H. Willie, chief justice of the supreme court of Texas, this 3d day of January, A. D. 1884.

A. H. WILLIE,
Chief Justice of the Supreme Court of Texas.

Endorsed: The Texas & Pacific Railway Company, plaintiff in error, *vs.* Jas. Murphy, defendant in error. Citation. Service issued Jan'y 15, 1884. Filed in supreme court of Texas, at Tyler, Jan'y 9, 1884. S. D. Reaves, clerk. M. & F.

111 *Writ of Error. Filed Jan'y* 9, 1884.

UNITED STATES OF AMERICA:

The President of the United States to the honorable the judges of the superior court of the State of Texas, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court of Texas, before you, or some of you, being the highest court of law or equity of the said State, in which a decision could be had in the said suit between the Texas and Pacific Railway Company, plaintiff in error, and James Murphy, defendant in error, wherein was drawn in question the construction of certain statutes of the United States, and the decision of the said supreme court of the State of Texas was against the rights and privileges specially set up and

claimed under such statutes by the Texas and Pacific Railway Company, a manifest error hath happened to the great damage of the said Texas and Pacific Railway Company, as by its complaint appears. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be
112 then and there held, that the record of proceedings aforesaid being inspected, the said Supreme Court may cause to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 3d day of January, A. D. 1884.

[SEAL.] M. HOPKINS,
Clerk of the Circuit Court of the United States for the Western District of Texas.
By SAM HOPKINS, *D'y Cl'k.*

Allowed this 3d day of January, 1884.

A. H. WILLIE,
Chief Justice of the Supreme Court of Texas.

113 Endorsed: The Texas & Pacific Railway Co., pl't'ff in error, *vs.* Jas. Murphy, d'f'd't in error. Writ of error. Filed in supreme court of the State of Texas, at Tyler, Jan'y 9, 1884. S. D. Reaves, clerk.

114 I, S. D. Reaves, clerk of the supreme court of the State of Texas, at Tyler, do hereby certify that the foregoing one hundred and twelve pages contain a full, true, and correct copy of the record filed in my office, with all the orders, judgments, opinions, and proceedings whatsoever had in said supreme court of Texas, in the above-entitled cause of the Texas and Pacific Railway Company, appellant, against James Murphy, appellee, of the petition for writ of error and allowance thereof, and of the bonds for error, to which I have attached the original writ of error and citation in error and return thereon, retaining in my office the original petition for error, writ of error bond, and the copy of the writ of error lodged by plaintiff in error for defendent in error.

In testimony whereof, I have hereunto subscribed my name and affix the seal of said court, at office in Tyler, Texas, this 23d day of January, A. D. 1884.

[SEAL.] L. D. REAVES, *Clerk.*

Endorsed on the cover: Texas Supreme Court. No. 1262. The Texas and Pacific Railway Company *vs.* James Murphy, plaintiff in error. Filed 29th February, 1884.

115-142

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 824.

THE TEXAS AND PACIFIC RAILWAY COMPANY

vs.

JAMES MURPHY.

W. D. DAVIDGE,
Attorney for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS.

claimed under such statutes by the Texas and Pacific Railway Company, a manifest error hath happened to the great damage of the said Texas and Pacific Railway Company, as by its complaint appears. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be
112 then and there held, that the record of proceedings aforesaid being inspected, the said Supreme Court may cause to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 3d day of January, A. D. 1884.

[SEAL.] M. HOPKINS,
Clerk of the Circuit Court of the United States for the Western District of Texas.
By SAM HOPKINS, *D'y Cl'k.*

Allowed this 3d day of January, 1884.

A. H. WILLIE,
Chief Justice of the Supreme Court of Texas.

113 Endorsed: The Texas & Pacific Railway Co., pl't'ff in error, *vs.* Jas. Murphy, d'f'd't in error. Writ of error. Filed in supreme court of the State of Texas, at Tyler, Jan'y 9, 1884. S. D. Reaves, clerk.

114 I, S. D. Reaves, clerk of the supreme court of the State of Texas, at Tyler, do hereby certify that the foregoing one hundred and twelve pages contain a full, true, and correct copy of the record filed in my office, with all the orders, judgments, opinions, and proceedings whatsoever had in said supreme court of Texas, in the above-entitled cause of the Texas and Pacific Railway Company, appellant, against James Murphy, appellee, of the petition for writ of error and allowance thereof, and of the bonds for error, to which I have attached the original writ of error and citation in error and return thereon, retaining in my office the original petition for error, writ of error bond, and the copy of the writ of error lodged by plaintiff in error for defendent in error.

In testimony whereof, I have hereunto subscribed my name and affix the seal of said court, at office in Tyler, Texas, this 23d day of January, A. D. 1884.

[SEAL.] L. D. REAVES, *Clerk.*

Endorsed on the cover: Texas Supreme Court. No. 1262. The Texas and Pacific Railway Company *vs.* James Murphy, plaintiff in error. Filed 29th February, 1884.

115-142

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Attorney for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS.

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 824.

THE TEXAS AND PACIFIC RAILWAY COMPANY

vs.

JAMES MURPHY.

STATEMENT.

The plaintiff in error, defendant below, was sued for a tort in a court of the State of Texas, the district court of Harrison county, and filed its petition for the removal of the cause to the circuit court of the United States for that district. The petition was verified by oath, and set forth the commencement of the suit; that the defendant was a corporation created by and organized under a law of the United States (set out by its title), and was not a banking corporation; and that it had a defence arising under a law of the United States, to wit, the act of incorporation, but the nature of the defence was not specified in the petition. (R., 3.)

Accompanying the petition and filed at the same time was a bond, in conformity with the requirements of sec. 639, R. S. U. S., which the petition offered as good and sufficient surety. (R., 3, 4.)

The court overruled the petition, and the defendant excepted. (R., 4.) The order overrulling adjudged the bond sufficient. (R., 5.)

The cause then proceeded in the State court, and resulted in a verdict and judgment against the defendant for $9,000, (R., 28,) which judgment was affirmed by the supreme court of the State of Texas, (R., 41.)

The defendant then sued out this writ of error.

ASSIGNMENT OF ERROR.

The supreme court of the State of Texas erred in affirming the judgment of the district court of Harrison county sustaining the order overruling the petition to remove.

POINTS AND ARGUMENT.

1. The bond was adjudged sufficient.

2. When removal was demanded in proper form, the jurisdiction was changed. The State court could only determine that removal did not follow as a conclusion of law from the facts alleged. If a sufficient case was made on the face of the petition, the jurisdiction of the State court came to an end, and all subsequent proceedings were *coram non judice* and void, and the defendant lost none of his rights by contesting the case in the State court after it wrongfully refused to give up jurisdiction.

R. R. Co. *vs.* Kountz, 104 U. S., 5, 14.
Steamship Co. *vs.* Tugman, 106 U. S., 118, 122.
R. R. Co. *vs.* Mississippi, 102 U. S., 135.
Removal Cases, 100 U. S., 457.
Insurance Co. *vs.* Dunn, 19 Wall., 214.
Kanouse *vs.* Martin, 15 How., 198.
Gordon *vs.* Longest, 16 Pet., 97.

3. The conditions of removal prescribed by S. 640, R. S. U. S., (Act of July 27, 1868, 15 Stat., 227,) were literally fulfilled.

There was a suit commenced in a court other than a circuit or district court of the United States. The defendant was a

corporation organized under a law of the United States, and was other than a banking corporation.

A petition was filed, "verified by oath, *stating* that such defendant has a defence arising under or by virtue of * * * a law of the United States." Good and sufficient surety was offered.

Thus there was exact compliance with the postulates of removal.

It is urged that the statute was not complied with, inasmuch as the particular defence was not stated. The answer is that the conditions of removal rested exclusively in the discretion of Congress, and that the statute, in terms, required the defendant to state *that it had a defence, under a law of the United States, not what such defence was.*

The design of Congress evidently was that the particular defense should be stated in the circuit court which could try and determine, not in the State court, which could not.

The scheme of the law is very simple. It assumes that the trial of the question of jurisdiction in its entirety, law and fact, belongs to the Federal forum, and that the defendant ought to have the benefit of such trial in the beginning by removal instead of at the end by writ of error, and to effectually secure that benefit and prevent all inquiry by the State court into the character and sufficiency of the defence as an element of jurisdiction, it provides that for the purpose solely of removal and trial of the question of jurisdiction, the declaration or claim of the defendant that it has a defence shall stand as the equivalent of the defence itself.

Such a provision is not unusual when the forum to try is the object of legislation.

Had the law provided that the defence should be specifically set forth, State courts might have claimed, with some appearance of reason, the right to decide upon the defence in its connection with the question of jurisdiction, which was the very thing sought to be prevented.

This case abundantly illustrates the wisdom of the law-

makers, for here the most explicit language failed to arrest the greed of the State court. But, whatever the theory of the law, its words are plain; and, if it meant anything else than what it says, *quod voluit non dixit.*

The judicial construction of the law has uniformly been that the defence need not be stated.

Jones *vs.* Inter-Oceanic Nav. Co., 11 Blatch., 362.
Fisk *vs.* Union Pacific, 6 Blatch., 362.
Fisk *vs.* Union Pacific, 8 Blatch., 243.
Turton *vs.* Union Pac., 3 Dill., 366.
Texas *vs.* Texas and Pac., 3 Woods, 308.
Kain *vs.* Texas Pacific, 3 Central L. J., pp. 12, 13.

On behalf of the defendant in error, Gold Washing Co., *vs.* Keys, 96 U. S., 199, is relied on.

But that case has not the remotest relation to what the petition in the State court must state under section 640.

The case was a writ of error to the circuit court for the district of California. The error assigned was the remanding a case which had been removed from the State court. The motion to remand "was submitted upon the record sent from the State court." (P. 201.) All that was decided was that the courts of the United States being of special jurisdiction, the facts necessary to give jurisdiction must appear in every suit, and that if the petition for removal, filed as part of the record in the circuit court, does not show the jurisdiction of that court, "and the omission is not afterwards supplied," the cause must be remanded. The removal was under the act of 1875, and the remarks of the court as to the proper practice are confined to removals under that law, which does not provide specially for what the petition shall contain, but leaves that subject for the application of general principles; and the court expressly declares that "the present case is not to be considered conclusive upon any question, except the one directly involved and decided." (P. 204.)

Certainly this case did not decide that it was not for Congress to prescribe the conditions of removal, nor that, when Congress had specially prescribed them, as in section 640, compliance with them did not work a removal, though taken alone, and without subsequent pleadings, in the Federal court, they would not sufficiently state the jurisdictional facts required to appear upon the record of that court.

But to proceed: That there could be a defence under the act of incorporation, which would be a defence arising under a law of the United States, will hardly be questioned. Such a charter is none the less a law of the United States. It is of no avail to say that no defence arising under a law of the United States was made. The defendant was not obliged to make it *coram non judice*.

Cases first above cited.

The State court wrongfully holding on to jurisdiction after the removal by operation of law, its proceedings and the judgment of the Supreme Court are nullities.

4. The act of March 3, 1875, s. 1, vests in the circuit courts original cognizance, concurrent with the courts of the several States, of all suits (involving the prescribed amount) within the judicial power of the United States, except those in which original jurisdiction was by the Constitution given to this court, and such as were of admiralty and maritime jurisdiction.

The grant of jurisdiction is in the very words of the Constitution, and, subject to the above limitations as to amount and admiralty and maritime jurisdiction, comprehends all the jurisdiction which Congress could confer upon the inferior judicial tribunals. The grant is plenary and exhaustive.

Section 2 adopts the language of section 1 as to jurisdiction, and provides, in substance, that the right of removal shall be co-extensive with the jurisdiction of the circuit courts.

A suit against a corporation created by and organized under a law of the United States, is a suit arising under a law of the United States.

Osborn *vs.* Bank U. S. (1824), 9 Wheat., 738, 823, 826, 827.

Bank U. S. *vs.* Deveraux (1809), 5 Cranch., 61, 85, 86.

For the argument of this proposition the court is respectfully referred to the brief filed in the case of the Union Pacific Railway Co. *vs.* Myers, No. 291 of this term.

If the status of the defendant made the suit one arising under a law of the United States, the petition alleging such status stated specifically the ground of Federal jurisdiction.

W. D. DAVIDGE,
Attorney for Plaintiff in Error.

115-142

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1884.

Texas and Pacific Railway Co.

vs.

A. F. McAllister.

Texas and Pacific Railway Co.,

vs.

James Murphy.

Brief of

W. HALLETT PHILLIPS
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Defendants in Error.

WASHINGTON, D. C.:
R. O. POLKINHORN & SON, PRINTERS,
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IN THE

SUPREME COURT OF THE UNITED STATES.

TEXAS AND PACIFIC RAILWAY CO.
vs.
A. F. MCALLISTER. } No. 610.

TEXAS AND PACIFIC RAILWAY CO.
vs.
JAMES MURPHY. } No. 824.

610

Brief of W. Hallett Phillips and A. H. Garland,
for Defendants in Error.

This suit was brought by McAllister, in the District Court for Harrison County, Texas, to recover damages for an injury suffered while a passenger on defendant's road.

The complaint alleges that the injury was caused by the unsound condition of the track over which the cars of the Company were being transported, and by the gross carelessness of the employees of the company.

The defendant in its answer, filed November 13, 1879, denies that the injury was caused by its negligence or by

the bad condition of the road, and alleges that the accident through which the injury occurred, was the result of the action of cold weather upon the iron rails. It also pleaded in abatement that the same suit was then pending in the United States Court at Jefferson, Texas, by reason of an attempted removal. This plea in abatement was overruled.

On May 9, 1879, the company filed, in the District Court of Harrison, County, a petition for removal accompanied by a bond.

In this it is stated that the action is a suit of a civil nature at law, and the matter in dispute, exclusive of costs, exceeds five hundred dollars, and arises under the laws of the United States.

That defendant is a corporation, created, existing and organized under and by virtue of certain acts of the Congress of the United States, to wit, "an act entitled an act to incorporate the Texas and Pacific Railway Company, and to aid in the construction of its road, approved March 3, 1871, and an act supplementary thereto, approved May 2, 1872. That petitioner has a defense to the action arising under and by virtue of a law of the United States, to wit—said act of incorporation. That petitioner is not a banking corporation, but is a railroad corporation, authorized to construct, own, and maintain a railroad to and from certain places designated in said acts of Congress above." (R. 6.)

The plaintiff filed exceptions to the petition, on the ground that it was insufficient in law; that the petition does not show what the defense is, arising under a law of the United States; plaintiff also denied that the defendant is a corporation created and existing under acts of Congress. (R. 8.)

The application for removal was refused and the trial was proceeded with.

This resulted in a verdict and judgment for the plaintiff for $8,000 actual damages. (R. 37.)

Among the errors assigned by the defendant on appeal to the Supreme Court of the State, are the overruling of the plea in abatement, and the refusal to remove the cause.

The Supreme Court affirmed the judgment, and the Company prosecuted a writ of error to this court.

The only Federal question involved in the case is whether the removal should have been permitted.

The ground for removal is the same as that presented in the Union Pacific Railway Cases, viz, that the defendant is a corporation organized under a law of the United States, and has a defense arising under a law of the United States, to wit, its act of incorporation.

The Supreme Court held that it was not necessary to consider the objection that the defendant was not a Federal corporation. That fact they assumed. Neither did they notice the defect in the petition for removal, it not having been verified by oath.

They state:

> "Neither the plaintiff's nor the defendant's pleadings disclose the fact that the appellant could have had a defense under its corporate acts. We must resort, therefore, to the application alone. It stated the *conclusion of law* that the appellant had a defense under its charter, a law of the United States, without showing from what facts it drew that conclusion. Looking at that charter, we see no defense to the present case which could possibly arise under it. The application, considered as a pleading, was defective in stating a conclusion instead of stating the premises, so that the court might draw its own conclusions. And the whole record shows that the conclusion was improperly drawn from the premises by the appellant.
>
> "The defenses relied on were such as might have been urged by any corporation or private person acting as a carrier of passengers under the same state of facts."

The court further held that the mere fact of the incorpo-

ration of the defendant company by Congress, was not sufficient to entitle it to a removal. R., 55.

The petition for removal is based on the Act 27, July 1868, Section 640, R. S.:

> "Any suit commenced in any court other than a Circuit or District Court of the United States against any corporation other than a banking corporation, organized under a law of the United States, or against any member thereof as such member for any alleged liability of such corporation, or of such member, as a member thereof, may be removed for trial in the Circuit Court for the District where such suit is pending, upon the petition of such defendant, verified by oath, stating that such defendant has a defense arising under or by virtue of the Constitution or of any treaty or law of the United States. Such removal, in all other respects, shall be governed by the provisions of the preceding section."

We will not repeat in this brief what has been said in brief for defendant in error, in *Union Pacific R. R.* vs. *Myers*, as to the proper interpretation of this section.

The position there taken is strongly supported by the reasoning of the Supreme Court of Texas, in the present case.

That the application for removal, performs the office of a pleading, was declared by this Court in *Gold Washing Co.* vs. *Keyes*, 96 U. S., 199.

It is true, that case arose under the act of March 3, 1875, but the same principle applies to Sec. 640. If the defense arising under the law is not shown by the pleadings proper, it must be set forth in the petition for removal. It is not sufficient to allege that petitioner has a defense under a law of Congress. The petition must state the facts which call the law into operation. The Court to whom the petition is ad-

dressed must be enabled by its allegations to see whether the defense does necessarily arise, under the statute.

The language of the petition for removal leaves no doubt that the sole intention of its framer was to announce the proposition of law, that the Company had a defense arising under the law of the United States, *because* it was a corporation organized under such a law. In other words, that a corporation chartered by act of the General Government has, in every case, a defense under the statute incorporating it.

The removal in the present case having been sought solely under the act of 1868, Sec. 640, R. S., this proposition is sufficiently answered by the language of that section.

The privilege of removal is conferred on a Federal corporation not *because* it is such a corporation, but only when it has a defense to the action arising under the Constitution or laws of the United States.

As stated by Mr. Trumbull, the chairman of the Judiciary Committee of the Senate, on reporting the act "the *State Courts may still retain jurisdiction of cases by or against corporations organized under a law of the United States notwithstanding the passage of this bill;* but a corporation thus organized would have the right on showing by affidavit that it had a defense based upon a law or treaty of the United States or the Constitution, to remove the cause into the United States Courts."

In the present case, however, the same claim is set up as that asserted in the Union Pacific Cases, that by the act of March 3, 1875, the former law is changed. That under this act the company only needs establish that it is a corporation created by the United States, inasmuch as it was declared in *Osborn* vs. *Bank of the United States*, that every suit against a Federal corporation, is a case arising under a Federal law.

An examination of the record shows that neither in the petition for removal, nor before the Supreme Court of the State, was there any right asserted to a removal under any other act than that of 1868, Sec. 640,

If the company can now contend that the case is removable under the act of 1875, we submit that Sec. 640, furnishes the sole authority for the removal of action against Federal corporations.

It is admitted that this section is in full force, and not repealed by the second section of the act of 1875, allowing the removal of suits arising under the Constitution or laws.

Section 640, prescribes a limitation to the right of removal by a Federal corporation, to-wit, that it must show a defense arising under a law of the United States.

Under the construction placed by opposing counsel on the act of 1875, it is not necessary for the company to show such a defense, because every case which such a corporation has, is a case arising under a law of the United States. To sustain this view a much broader construction must be given to the act of 1875, than can be given to Sec. 640, R. S.

Under that Section National Banks are excluded from the right given other Federal corporations to remove actions brought against them, when they show a defense arising under a law of the United States.

Can National Banks remove such suits on this ground under the Act of 1875? If they cannot, it is because they are excluded from the right of removal by Sec. 640.

If National Banks are held down as to the right of removal by the provisions of Sec. 640, other Federal corporations cannot go beyond that act; to entitle such a corporation to a removal, it must show that it is a corporation organized under a law of the United States, *and* that it has a defense arising under a law of the United States.

As has been pointed out, the great difference between the present case and the Osborn case, is, that in the latter

case the sole question involved was the constitutionality of *an express grant of jurisdiction*, enabling the Bank of the United States to sue in the Circuit Courts of the United States.

Besides, the case of Osborn was as strong a *casus federis* as could be presented. It was clearly a case to which the judicial power of the United States extended.

The jurisdiction of the court over the case was sustained under the act of incorporation.

It is true that some of the reasoning of the court seem to lay down a broader doctrine; but as was remarked by this court, speaking of *McCullough* vs. *Maryland*, the decision must be limited to the case before the court.

Thompson vs. *Pacific Railroad*, 9 Wall., 590.

Speaking of the remarks in the Osborn case as to what constitutes a case arising under a law of the United States, Chief Justice Church says:

> "It would be an unwarrantable extension of the principle of that decision to apply it to every action against a corporation created by Congress. Whether a corporation is created by one power or another is manifestly immaterial in many actions which might be brought against it. The commencement of the suit admits the capacity of a corporation to be sued, and the very first step of the plaintiff may show that no question can arise of Federal cognizance. Take, for example, an action to recover money, the complaint alleging that the plaintiff deposited $100 with the bank, defendant, which, on demand, it refused to pay, and issue is joined by a denial that the plaintiff ever deposited the money. Can it be that this is a case arising under the Constitution or laws of the United States? To regard it as such involves the perversion of legal language. Nor can any reason be assigned, why a strained and artificial construction should be adopted for the purpose of depriving State tribunals of their legitimate functions. Under the appellate jurisdiction of the Su-

preme Court of the United States, which is referable to the same general power as the original jurisdiction, it is well settled that it is not sufficient to show that a question might have arisen, unless it is shown, that it did in fact arise in the case. 20 Pet., 368; 12 Wheat., 117. I insist that the possibility of a question does not make a case arising under Federal law; but if it did in the case supposed and in most others likely to be brought, it is difficult to see how any such question could be raised. The existence of the corporation is conceded by suing it as such, and the issue made is confined to the fact of receiving the money. This view can work no injustice to these associations, nor deprive them of any right to be heard in the United States Court, if the case is one to which the jurisdiction extends, as the right of removal, both on account of the nature of the case and the condition of citizenship, is secured by various statutes."

Cooke vs. *State National Bank*, 52 N. Y., 96.

If the views put forth for the Company are correct it was unnecessary for the petition for removal to allege that the case was one arising under laws of the United States, or that the company had a defense arising undersuch laws. It need only have stated that the company was incorporated by the United States, and the "case" and "defense," the court would be judicially bound to notice, from the fact of incorporation.

If this is true, it follows that a different rule is to be applied to removal by *Federal corporations* from that applied to removals generally.

As we have seen, under the act of 1875, this court has held that not only must it appear that the case is one arising under a law of the United States, but unless it otherwise appears from therecord, the petition must state the facts showing the right the petitioner claims, so as to enable the court to see whether it necessarilyde pends upon the construction of the statute.

But we do not concede that the defendant company

comes under the designation of a United States corporation.

What is the jurisdictional status of the Texas and Pacific Railway within the State of Texas?

March 3, 1871, Congress passed an act incorporating the *Texas Pacific* Railroad Company.

Prior to that time the State of Texas had incorporated the Southern Pacific Railroad Company and the Southern Trans-Continental Railway Company.

The object of the State in these several acts of incorporation was to secure the construction through the State of a railway connecting the railway system of the Atlantic States with the Pacific Ocean.

By Sec. 11of the act May 24, 1871, it is provided—

> "All the rights, benefits, and privileges granted and intended to be secured by this act to the Southern Pacific Railroad Company, and to the Southern Trans-Continental Railway Company, shall pass to and vest in the Texas Pacific Railroad Company, a corporation created by and under the laws of the United States by an act of Congress, approved March 3, A. D. one thousand eight hundred and seventy-one, whenever the said Southern Pacific Railroad Company, and the Southern Trans-Continental Railway Co. shall have been consolidated with the said Texas Pacific Railroad; and authority is hereby given to the said Southern Pacific Railroad Company and the said Southern Trans-Continental Railway Company and the said Texas Pacific Railroad to consolidate under such lawful terms and conditions as may be agreed upon between the said companies and be ratified by a majority of the stockholders of each of the corporation so consolidating; *Provided however*, that the said Texas Pacific Railroad Company shall take no benefit whatever under or by virtue of this act until the said company shall have fully performed all the conditions imposed by this act upon the Southern Pacific Railroad Company and the Southern Trans-Continental Railway Company."
>
> Special Laws Texas, 1871; p. 489.

By the act May 21, 1871, aid is granted by the State to the Southern Pacific Railroad Company and the Southern Texas-Continental Railway Company. Special Laws, 1871 Texas, 2, Sess. p. 92.

By the act of Congress, May 2, 1872, the name of the *Texas Pacific* Railroad Company is changed to that of *Texas and Pacific Railway Company*. 17, St. 59.

By the Texas act of May 2, 1873, the right of consolidation, conferred by the previous act is referred to, and it is provided "that whereas it appears that such consolidation has been effected, the said Texas and Pacific Railroad, as the successor of the Southern Pacific Railroad Company, a corporation of the State of Texas shall construct," &c., &c., The act specifies the line of the road to be built, and defines the rights of the Texas and Pacific Railroad as the successor of the Texas corporations. Laws of Texas, Special, 1873, p. 318.

In *Stephenson* vs. *Texas and Pacific R. R. Co.*, the Supreme Court of Texas, say:

> "There is nothing in the record or in the evidence submitted with the motion to dismiss, for the purpose of enabling us to ascertain the facts for the proper exercise of our jurisdiction, by which we are informed of the terms upon which said companies were consolidated. In the absence of any such information, we think the inference is fully warranted, that from the consolidation thus effected by authority of the State of Texas, there exists a consolidated Texas corporation, known by law of this State as the Texas and Pacific Railway Company, in which is vested all the rights, powers and privileges to which the Southern Pacific Railroad Company was entitled previous to such consolidation, and that the corporate existence of the Southern Pacific Railroad Company has been merged in, and now is represented by said Texas and Pacific Railroad Company; that the charter of the Southern Pacific Railroad Company is neither lapsed, forfeited, annulled or surrendered, but still exists in its full force and vigor; these rights,

privileges, and franchises being exercised to the extent and in the manner agreed and stipulated by the terms of their consolidation by the corporate organization and name of the Texas and Pacific Railway Company. If the entire corporate existence of the Southern Pacific Railroad Company is not merged in the Texas and Pacific Railway Company by the consolidation of these companies, it plainly devolved upon the party moving to dismiss the writ of error to rebut this presumption, plainly inferable from the acts of the Legislature, under and by virtue of which this company exercises and enjoys the franchises and privileges conferred upon it by the State of Texas, and is entitled to be known and recognized as a Texas corporation."

42 *Texas*, 167.

The rights of the Texas and Pacific Railway Company in the State of Texas, are possessed and exercised as the successor of the Southern Pacific Railway Company, a State corporation. As such successor, it can claim no greater immunities, or privileges, than could have been claimed or exercised by the Company which it succeeded, and accordingly, it was not entitled to claim a removal of this action on the ground that it was a United States corporation.

A similar question regarding the Union Pacific Railway, as the successor of the Kansas Pacific is presented in the case of *Union Pacific Railway* vs. *Kansas City*.

The argument made in that case need not be here repeated.

Texas and Pacific R. R. vs. Murphy.

The action in *Texas and Pacific Railway* vs. *Murphy*, was brought by Murphy against the Southern Pacific Railroad Company, prior to its consolidation with the Texas and Pacific Railway Company, and was subsequently prosecuted against the latter Company as the successor of the Southern Pacific.

So far as the point of jurisdiction is concerned, the only